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No. 145

In the Supreme Court of the United States

October Term, 1956

[redacted], [redacted], [redacted] LEVINE COLLEGE, AND [redacted],

Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, AND SIDNEY STEINBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions in the Court of Appeals are reported at 231 F. 2d 155 (Pet. App. 4-73; R. 944-993).

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1956 (Pet. App. 4). A petition for rehearing was denied on April 20, 1956 (Pet. App. 75). On May 5, 1956, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to June 18, 1956. The petition was filed on June 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the circumstances surrounding the surveillance of petitioners gave probable cause to arrest them and, as an incident thereto, to search without a warrant the premises in which they were found.

2. Whether Sections 3, 371, and 1071 of Title 18 of the United States Code were unconstitutionally applied to petitioners.

3. Whether the indictment sufficiently charged petitioners with the crime of which they were convicted.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of 18 U. S. C. 3, 371, and 1071 are set forth in the Appendix to the petition (Pet. App. 77-78), as are the constitutional provisions involved.

STATEMENT

On October 22, 1953, a four count indictment was returned against petitioners and others.[1] The first count charged petitioners with being accessories after the fact in violation of 18 U. S. C. 3, by receiving, relieving, comforting and assisting Robert G. Thompson, a convicted Smith Act (now 18 U. S. C. 2385) fugitive, knowing him to be such;[2] the second count charged all the petitioners with conspiracy to violate 18 U. S. C. 3. The third count charged the petitioners, except Steinberg, with violating 18 U. S. C. 1071, by harboring and

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[1] At the end of the Government's case, the trial court acquitted Patricia Blau who was also named in the indictment (R. 912). Carl Ross, another defendant named in the indictment, was convicted and has completed his sentence; he is not a party to the petition (Pet. 3, fn. 3).

[2] After his apprehension in the company of the present petitioners, Thompson was convicted of criminal contempt and sentenced to a term of four years imprisonment. *United States* v. *Thompson*, 214 F. 2d 545 (C.A. 2), certiorari denied, 348 U.S. 841.

concealing Steinberg, knowing that a warrant had been issued for his apprehension; the fourth count charged the petitioners (except Steinberg) with conspiracy to violate 18 U. S. C. 1071 (R. 3-8).

During the period charged in the indictment, both Thompson and Steinberg were fugitives from justice. Robert G. Thompson was a defendant in *United States* v. *Dennis et al.* (S. D. N. Y.), a case receiving widespread news coverage, in which eleven leaders of the Communist Party were indicted, tried, and found guilty of conspiring to violate the Smith Act (R. 893). The judgment of conviction was affirmed by the Court of Appeals for the Second Circuit (183 F. 2d 201) and then affirmed by this Court in *Dennis* v. *United States*, 341 U. S. 494. Pending the appeal, Thompson had been admitted to bail. After his conviction had been affirmed, Thompson fled rather than surrender to serve his sentence, thereby forfeiting his $20,000 bail.

Petitioner Steinberg (under the name of Sidney Stein), together with 20 others, was indicted on June 19, 1951, by a grand jury in the Southern District of New York and charged with conspiracy to violate the Smith Act (R. 893). Sixteen of the persons charged in this indictment were apprehended shortly thereafter. Petitioner and three others charged could not be apprehended at that time. After a widely publicized trial, thirteen of petitioner's co-defendants in that case were convicted of violating the Smith Act.[3]

Despite intensive efforts by the Federal Bureau of Investigation, both Thompson and petitioner Steinberg remained at large until their apprehension by agents

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[3] These convictions were affirmed in the case of *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), certiorari denied, 348 U.S. 909.

of the Federal Bureau of Investigation on August 27, 1953, at a secluded cabin in the Sierra Nevada mountains near the small village of Twain Harte, California, in the company of Ross and petitioners Kremen and Coleman (R. 201, 340, 421-422).

Thompson, Ross, and petitioners Steinberg and Coleman were all long-time intimates. Thompson, Coleman, Ross, and Steinberg had their offices in the same building, Communist Party headquarters in New York, at approximately the same time (R. 509-512, 516). Coleman, Ross, and Steinberg were all identified as being with or in the presence of Thompson on numerous occasions, including conventions and meetings (R. 519-523, 855-856, 857). At approximately the same time that Thompson and petitioner Steinberg became fugitives from justice, petitioner Coleman and Ross left their families and homes (R. 609-615).

Petitioner Kremen, under the assumed name of Mrs. Lee Kaplan (R. 619, 621), rented the cabin near Twain Harte. She specified that she wanted "a spot where it would be quiet and rather secluded" (R. 620) for her "brother" (R. 620) who was "sick with nerves" (R. 620). In renting this particular cabin, she stated that she liked it because it was "very quiet" (R. 621).[4]

Petitioner Steinberg identified himself as "Mr. Newberg", and petitioner Kremen as his "sister", to the owner of the cabin (R. 669-670). Steinberg also introduced Ross as a "buddy" of his (R. 671). Steinberg

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[4] Petitioners' attorney, apparently realizing how damaging this testimony was, subjected the real estate agent to a lengthy and repetitious cross-examination which covered more than thirty pages (R. 627-656, 662-665). The trial judge was finally forced to limit the cross-examination of this witness because it had "come to the point of badgering" (R. 654).

seemed to be the host or household head at the cabin, extending an invitation to have breakfast to the owner, Mr. Germany (R. 669), and ordering Mrs. Kremen to pay Germany for a light bill (R. 671).

Petitioner Kremen was in charge of procurement. In the period preceding the arrest, she made several purchases of large quantities of food (R. 682-683, 778-781). On one occasion, she and a man attempted to purchase hair dye (R. 683).[5] Mrs. Kremen also performed various household tasks for the occupants of the cabin and hired a repairman to fix the cabin pump (R. 194, 669, 695). In the company of Thompson and Steinberg, Mrs. Kremen purchased a pair of swim trunks "for a friend that was ill at the time" (R. 700-702).

It appeared at the trial that petitioner Coleman was with Thompson for some time prior to their apprehension. On June 5, 1953, Coleman purchased a Hudson automobile in St. Louis, Missouri, using the assumed identity of "William Gordon" (R. 548, 549).[6] The keys to this automobile were found in Thompson's pocket when he was apprehended (R. 430, 555, 558). Coleman (under the name of "Gordon") and Thompson were members of a party of four which rented boats at a resort in Camdenton, Missouri, on July 4, 1953 (R. 565, 576). In Bigfork, Montana, Thompson purchased a fishing license under the false name of "J. F. Brennan" (R. 596-597). Using their false names, Thompson and Coleman stayed at a cabin some 30 miles from Bigfork from August 10 to August 17, 1953 (R.

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[5] When apprehended, Thompson had dyed red hair and a moustache dyed red (R. 326).

[6] Indicating that speed was essential, Coleman stated he wanted the car "as soon as possible" and paid for it in cash (R. 549).

601). They used a Hudson automobile with Missouri license plates on this trip (R. 602). The Hudson automobile purchased by "Gordon" in Missouri entered California on August 20, 1953 (R. 409-410, 412). Also, Coleman and Thompson were seen together in Twain Harte prior to their arrest (R. 701, 709).

Thirty minutes after positive identification of Thompson and petitioner Steinberg had been made on August 27, 1953, at Twain Harte (R. 197, 323-324), agents of the Federal Bureau of Investigation arrested Thompson, Ross and the present petitioners. At the time of the arrest, Thompson and Steinberg were in the clear area in front of the cabin, while Ross and petitioners Kremen and Coleman were inside the house (R. 201). It was apparent that Thompson, Ross and the petitioners had spent the night at the cabin and were well established there (R. 189, 192-195, 210-212; G. Exs. 14-18, A-1 through A-14). Both Thompson and petitioner Steinberg had altered their physical appearance considerably, so that they looked much different than they had when they became fugitives. Thompson had dyed his hair, gained much weight and had grown a mustache since he left New York (R. 325-326). Steinberg had cropped his hair short, had grown a mustache, and was much thinner both in face and body (R. 325). When apprehended, none of the occupants of the cabin had any visible means of support. However, Thompson's wallet contained approximately $363 (R. 432) and approximately $450 was found in a belt on a chair in the cabin (R. 376-377).

The F. B. I. agents made a search of the cabin and of the persons of the five individuals apprehended at the time of the arrest. Thompson and petitioner Stein-

berg had elaborate documentary proof of false identities and were using aliases. Thompson had no less than twelve documents identifying him as "John F. Brennan" (R. 432-434; G. Ex. 97). Steinberg admitted ownership of a wallet containing false identification in the name of "Joshua Newberg", supposedly a teacher of violin and mandolin (R. 331, 334-336). Other identification for "Joshua Newberg" was found in the cabin (R. 232; G. Exs. 23, 24, 25).

Petitioner Kremen's purse contained a library card, a fire permit, a Social Security card, an identification card, and an automobile operator's license, all in the name of "Lee Kaplan"; she also had some bills and an invoice containing the name of "Richard Kaplan" (R. 362-363; G. Ex. 86). False identification documents for "William Gordon", the name assumed by petitioner Coleman (R. 548, 549, 575-576), were found in a wallet discovered in the cabin (R. 899).

Ross was positively identified as the man who purchased a duplicating machine [7] and some supplies under the name of "R. E. Newman" (R. 716, 718, 720; G. Ex. 114, 115); in addition, false identification documents, a Social Security card, and a driver's license in the name of "Robert Newman" were found in a billfold in the cabin (R. 379, 899-901, G. Ex. 91).[8] A letter found on Ross's person indicated that he was to meet someone

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[7] This machine was found in the cabin at the time of petitioners' arrest (R. 718-720).

[8] A document in the wallet contained the following cryptic information:

> Local Police Rear of libe ref room.
> Atlas open to map of California.
> Person entering carries Colliers.
>
> (R. 900; G. Ex. 91)

and receive instructions (R. 208; G. Ex. 7).[9] He also had on his person a grocery list for large quantities of food (R. 207-208).

After various pretrial motions (R. 18, 21, 22) for suppression and return of property found at the cabin at the time of arrest had been disposed of,[10] the trial commenced. Following the impaneling of the jury, petitioners apparently made another motion to suppress (R. 163, 183) which was denied on April 13 (R. 73). During the trial, petitioners made motions to suppress on the grounds that the search was "illegal and improper" (R. 202, 204, 216, 217, 219, 220, 228, 231, and various other times throughout the trial). These were all denied.

Petitioners and Ross were found guilty by the jury on all counts against them. Mrs. Kremen was sentenced to one year on counts 1 and 2, and to six months on counts 3 and 4, all to run concurrently. Coleman was sentenced to one year on count 1 and one year on count 2, and to six months each on counts 3 and 4, all to run consecutively. Steinberg was sentenced to two years each on counts 1 and 2, to run consecutively. The convictions were affirmed by the Court of Appeals, Chief Judge Denman dissenting.

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[9] The pertinent portion of the letter reads as follows:

> The person on this end of arrangement is being instructed to break off with your lady until he makes certain other arrangements. As previously agreed, contact from your end to be with S, with whom we are in contact. S will explain further and make necessary further arrangements.

[10] Petitioners' motion of February 8, 1954, was denied on the ground that petitioners did not allege any interest in the property found on the premises searched (R. 26-28); petitioner's motion of April 5, 1954, was taken off the calendar by stipulation (R. 73).

ARGUMENT

1. Petitioners Kremen and Coleman contend (Pet. 15-22) that evidence taken from their persons should not have been admitted against them because their arrest was made without warrant [11] and without probable cause for belief that they had committed or were committing a felony. All three petitioners complain of the search of the cabin and the seizure of the material found there.

(a). An agent of the F. B. I. may lawfully arrest without a warrant persons whom he has probable cause to believe have committed or are committing a felony in his presence. 18 U. S. C. 3052. As this Court has frequently observed, there is no precise formula for determining probable cause or reasonableness; each case must be viewed in the light of its own facts and circumstances. *United States* v. *Rabinowitz*, 339 U. S. 56, 60, 63; *Brinegar* v. *United States*, 338 U. S. 160, 172-176; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357. It is clear that the standard of proof required to show probable cause is far less stringent than that required to establish guilt; and that nothing more is required to justify an arrest than that the circumstances known to the officer, by personal observation or by reasonably trustworthy information, were such as would justify a man of reasonable caution in the belief that a felony had been or was being committed.[12] *Brinegar* v. *United*

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[11] The arrest of Steinberg was made pursuant to a valid bench warrant issued for his arrest in New York on June 20, 1950 (R. 900; 201), and is not in issue here.

[12] Contrary to petitioners' suggestion (Pet. 16), in determining the existence of probable cause for an arrest without a warrant, it is not necessary to exclude every hypothesis of innocence. *United States* v. *Bianco*, 189 F. 2d 716, 720 (C.A. 3); see also *Brinegar* v. *United States*, *supra*.

States, supra; Carroll v. *United States,* 267 U. S. 132, 161-162.

Here, the agents of the F. B. I. were not positive that Thompson and Steinberg were among those at the cabin until thirty minutes before the arrest (R. 197, 323-324). Until these fugitives had been identified, the agents did not have probable cause to arrest those present or to secure a search warrant. Once the fugitives were identified, there was certainly probable cause to believe that a felony—being accessory after the fact—was being committed in the very presence of the agents. Since these two men had successfully evaded apprehension for more than two years, and there were two automobiles near the cabin, the agents would have been derelict in their duty if they delayed in making the arrest. In the circumstances facing them, the agents cannot have been required to travel from remote Twain Harte in the Sierra Nevada mountains to the nearest United States Commissioner or District Judge, and then back again, before making the arrests. *United States* v. *Rabinowitz,* 339 U. S. 56, states the rule (at page 65):

> The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

(b). As for the search, it is settled that the person of one lawfully arrested as well as the premises in which the arrest is made may be reasonably searched, and that

things found may be used in evidence at the trial. *United States* v. *Rabinowitz*, 339 U. S. 56, 61; *Agnello* v. *United States*, 269 U. S. 20, 30; *Marron* v. *United States*, 275 U. S. 192, 199; *United States* v. *Lindenfeld*, 142 F. 2d 829, 832 (C. A. 2), certiorari denied, 323 U. S. 761, and cases cited therein.

Petitioners assert (Pet. 16), however, that the search of the cabin was "utterly unreasonable", particularly because the items found were not criminal to possess (Pet. 19-20). But it is not the law that the only material which can be seized is contraband; instrumentalities of the crime or things which directly further and aid the commission of the offense can certainly be taken. In *Marron* v. *United States*, 275 U. S. 192, 198-199, for instance, bills for gas, electricity, water and telephone service, a ledger, and liquor were seized.[13] Similarly here, the items seized and introduced at the trial were not merely evidence of guilt; they were equivalent to devices used directly in the commission of the particular crimes with which petitioners were charged. In general, the only seized documents which were introduced were false identity papers which were used to safeguard Thompson and Steinberg from any risk that petitioners' true names would lead to the arrest of the fugitives and certain notes in the possession of Ross, who is not a petitioner. The false identification documents taken during the search bear the same relation to petitioners' crime as did the "burglar tools, gambling paraphernalia, and illicit liquor" (Pet. 20) to the

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[13] In *United States* v. *Rabinowitz*, 339 U.S. at 62, this court made a special point of saying that "[w]e do not understand the *Marron* case to have been drained of contemporary vitality by *Go-Bart Co.* v. *United States*, 282 U.S. 344, and *United States* v. *Lefkowitz*, 285 U.S. 452."

crimes involved in the cases accepted as correct by petitioners. They were the instrumentalities through which the crime was carried out. By the same token, it was not improper for the officers to search "all parts of the premises used for the unlawful purpose" of harboring and concealing the fugitives. The cabin was itself a prime instrumentality of the crime. See *Marron* v. *United States*, 275 U. S. 192, 199; *Harris* v. *United States*, 331 U. S. 145; *United States* v. *Rabinowitz*, 339 U. S. 56.

2. Petitioners' second point (Pet. 23-33) is that the harboring and accessory provisions of the criminal code were unconstitutionally applied to them in three different fashions.

(a). They contend (Pet. 23-27) that they were "placed in double jeopardy by an unconstitutional pyramiding of offenses," in that they were convicted of two substantive and two conspiracy offenses arising out of the very same set of acts. But it is conceded (Pet. 23), as it must be, that a single act may supply the basis for conviction of two or more offenses as long as each requires the proof of a fact not essential to the other (*Pereira* v. *United States*, 347 U. S. 1, 9), and it is clear that the substantive offenses here are substantially different in that sense. All three petitioners sought to "hinder or prevent" the "punishment" of Thompson by rendering him aid, comfort and assistance; Kremen and Coleman harbored and concealed Steinberg "to prevent his discovery and arrest." These are two separate and distinct crimes accomplishing different purposes.

Nor were the conspiracy counts improperly added, since conspiracy is normally a crime separate and apart

from the substantive offense which is its object. *Pinkerton* v. *United States*, 328 U. S. 640, 644. Only where two or more persons must *necessarily* agree in order to accomplish the substantive crime is the conspiracy offense merged. See *United States* v. *Katz*, 271 U. S. 354. That is not true here. Petitioners concede that the crimes of harboring and accessoryship are capable of being committed by "one person alone" (Pet. 25), and the record shows, as in many comparable cases, that each individual petitioner could and did perform the acts constituting the substantive offenses at the same time that they also agreed and acted together to commit those crimes. See *Pereira* v. *United States*, 347 U. S. 1, 11-12.[14]

(b). 18 U. S. C. 3, petitioners next say (Pet. 28-30), cannot apply where the principal offender (here Thompson) has already been convicted. Aside from its strange frustration of the clear statutory purpose to deter aid and comfort to known offenders, the main defect in this argument is that 18 U. S. C. 3 (Pet. 77) expressly defines the crime of accessory after the fact to include "[w]hoever * * * hinder[s] or prevent[s] his * * * apprehension, trial *or punishment*" (emphasis added), and punishment, of course, can only be rendered after conviction. This accords with the com-

[14] Petitioners also argue (Pet. 26-27) that "the prosecution split what was at most a single conspiracy into two separate conspiracies". But the test of whether activities constitute a single conspiracy or multiple conspiracies is the object of these activities. *United States* v. *Rosenberg*, 195 F. 2d 583, 600-601 (C.A. 2), certiorari denied, 344 U.S. 838; *United States* v. *Speed*, 78 F. Supp. 366, 368-369 (D. D.C.); cf. *Kotteakos* v. *United States*, 328 U.S. 750, 769. Here, there were multiple objectives, and therefore multiple conspiracies. The jury could well find two separate and distinct objectives and conspiracies: 1) to harbor Steinberg, and 2) to give aid, comfort, and assistance to Thompson.

mon law which declared that aid rendered to a known felon for the purpose of preventing his punishment, before or after his conviction, rendered the aider an accessory. Bishop, *Criminal Law* [9th ed.], Section 692, p. 497; 4 Blackstone, *Commentaries*, 37, 38; *Elmendorf* v. *Commonwealth*, 188 S. W. 483; *Rex* v. *Greenacre*, 8 Car & P. 35.

(c). Petitioners also contend (Pet. 30-33) that their convictions were obtained without sufficient proof of *scienter*. But if one recognizes the almost-impossibility of proving a mental state by direct evidence (*Holland* v. *United States*, 348 U. S. 121, 140), and accepts the settled principle that *scienter* may be inferred from the facts and circumstances (*Morrisette* v. *United States*, 342 U. S. 246, 276; *Nassan* v. *United States*, 126 F. 2d 613 (C. A. 4)), it becomes plain, we submit, that in this case there is substantial evidence to sustain the jury's verdict. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80.

Petitioners were apprehended under very suspicious circumstances. At the time of their arrest, they were residing in a very secluded mountain cabin under assumed names in the company of well-known fugitives from justice. Coleman and Steinberg were long-time cohorts of Thompson at New York Communist Party headquarters (R. 505-513). Coleman supplied Thompson with a car (R. 430, 555, 558), and accompanied him around the country (R. 565, 596, 601,603); Steinberg was in charge of and host at the cabin (R. 670-671). They knew that Thompson was using a false name and had materially altered his appearance. It strains credulity that Communist Party members of their status

would not know of the conviction and escape of a top Communist Party leader. See also *supra*, pp. 3-4, 5-8.[15]

Mrs. Kremen rented a cabin for her supposedly sick brother (R. 620-622). Her "sick brother" turned out to be Steinberg who was neither ill nor related to her, and who at that time was also a fugitive. She used a false name and possessed elaborate documentary indicia of a false identity (R. 362, 363; G. Ex. 86). She purchased large quantities of food (R. 676, 685, 778), bought sporting supplies (R. 701-702), performed household tasks for the occupants of the cabin (R. 193-194, 669), and saw to the maintenance of at least one of the vehicles (R. 787-789). On one of her shopping expeditions, her male companion purchased hair dye (R. 683). When apprehended, Thompson had dyed his hair and moustache (R. 326). The only rational explanation presented to the jury for these activities—the explanation proffered by the Government—was that she wished to prevent the apprehension of Steinberg and Thompson. On the record made at the trial there is no other reasonable explanation. In *Holland* v. *United States*, 348 U. S. 121, 138-139, the Court stated that "once the Government has established its case, the defendant remains quiet at his peril." The jury was therefore justified in making the inference obviously presented by the evidence.[16]

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[15] Although Chief Judge Denman dissented below, he would sustain the convictions on the accessoryship substantive and conspiracy counts against petitioners Coleman and Steinberg (231 F. 2d at 182; Pet. App. 71-72).

[16] Petitioners' reliance upon *Fulbright* v. *United States*, 91 F. 2d 210 (C.A. 8) is misplaced. In that case, there was evidence that the defendants thought the principal offender was a fugitive from *state* process. Here, petitioners failed to introduce any evidence

3. Petitioners' third point (Pet. 33-37)—relating to the wording of counts 1 and 2 of the indictment and a charge of "fatal variance" between those allegations and the proof at the trial—is wholly based on the fact that these counts, in describing the offense of which Thompson was convicted, did not contain all the language of Section 2 of the Smith Act.[17]

But the question is not whether there has been a technical variance in proof but whether there has been such a variance as to affect the substantial rights of the accused. *Berger* v. *United States,* 295 U. S. 78, 82; *United States* v. *Cohen,* 145 F. 2d 82 (C. A. 2), certiorari denied, 323 U. S. 799; *Smiley* v. *United States,* 186 F. 2d 903, 905 (C. A. 9). That does not exist here. Petitioners' complaint is not really directed at the sufficiency of the indictment, but at the incidental recitals of Thompson's offense. Counts 1 and 2 both allege that Thompson had violated "Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act," and that description was enough to put petitioners on notice. Count 1 also charged petitioners with being accessories after the fact to Thompson who had been convicted of "conspiring to (1) organize a society for the overthrow of the Government of the United States by force and violence" (R. 3).[18] This is a compressed para-

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that Thompson and Steinberg were being hidden for any reason other than to prevent Thompson's punishment and Steinberg's arrest.

[17] Sections 2, 3 and 5 of the Smith Act were first codified in Sections 10, 11 and 13 of Title 18 of the United States Code, in 1940. In the present title 18, U.S.C., these sections, with certain modifications, are contained in Section 2385.

[18] Petitioners make no complaint as to the second part of count 1 which stated that Thompson had also been convicted of conspiring to "(2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence; . . ." (R. 3).

phrase of the language Chief Justice Vinson used in describing the conclusions of the Court of Appeals for the Second Circuit in upholding that court's decision affirming the conviction of Thompson and ten other Communist Party leaders,[19] and in any event there can be no doubt that petitioners and their lawyers knew precisely to what conviction the indictment referred.

The indictment thus fully apprised petitioners of the offense with which they were charged and will stand as a bar to any prosecution for accessory after the fact to Thompson's crime. This is all that is required. *Hagner* v. *United States,* 285 U. S. 427, 431; *Wilson* v. *United States,* 158 F. 2d 659 (C. A. 5), certiorari denied, 330 U. S. 850. It is enough that the essential elements of the offense appear in any form, or by fair construction can be found within the terms of the indictment, considered as a whole. *Hagner* v. *United States, supra,* at 433; *McCoy* v. *United States,* 169 F. 2d 776, 780 (C. A. 9), certiorari denied, 335 U. S. 898. Any error, defect, irregularity, or variance which does not affect substantial rights is disregarded. Rule 52(a), F. R. Crim. P. Clearly, petitioners were not prejudiced here.

The petitioners further contend (Pet. 36) that the trial judge erred in removing from the jury the issue of whether or not Thompson had actually been convicted of the offense alleged in the indictment. However, petitioners did not, and could not, contest the fact

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[19] Chief Justice Vinson's opinion stated that the Court of Appeals had concluded that the Communist Party's policy "worked for the overthrow of the Government by force and violence; * * * that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence." *Dennis* v. *United States,* 341 U.S. 494, 498.

that Thompson had been convicted of violating the Smith Act. As the record stands, there was no issue of fact for the jury to decide. Thompson's conviction was indisputably a fact and the trial judge properly withdrew from the jury's consideration that phase of the case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, AND SIDNEY STEINBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the Court of Appeals (R. 943–992) are reported at 231 F. 2d 155.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1956 (R. 992–993). A petition for rehearing was denied on April 20, 1956 (R. 993). On May 7, 1956, Mr. Justice Douglas extended the time

[1] Each member of the three-judge panel wrote a separate opinion. Judge Lemmon wrote the principal "affirming opinion" (R. 943–984), Judge Healey wrote a brief concurring opinion (R. 984–985), and Chief Judge Denman wrote a dissenting opinion (R. 985–992).

for filing a petition for a writ of certiorari to June 18, 1956 (R. 993). The petition was filed on June 14, 1956, and was granted on October 8, 1956 (R. 994). 352 U. S. 819. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in the circumstances shown petitioners have standing to raise the issue of their right to have the seized property suppressed.

2. Whether the search without a search warrant of the premises involved, conducted incident to the arrests of petitioners and others—two of them arrested pursuant to warrant for their arrest, the others arrested for committing a felony in the arresting officers' presence—was reasonable in the circumstances of this case.

2. Whether petitioners' convictions are based on unconstitutional or otherwise invalid applications of the harboring, accessoryship after the fact, and conspiracy statutes in that, allegedly,—

(a) at most one substantive offense was proved, because there was no element which was required to be proved under the count charging the harboring of Steinberg which did not also have to be proved under the count charging accessoryship after the fact to Thompson's violation of the Smith Act, and *vice versa;*

(b) there was no proof of more than one conspiracy;

(c) the offense charged in each of the conspiracy counts is the same offense as that charged in the corresponding substantive count;

(d) accessoryship after the fact to another's offense is incapable of being committed where the principal offender has already been convicted;

(e) the evidence is insufficient to establish that petitioners knew that Thompson had been convicted of violation of the Smith Act and that a warrant for Steinberg's arrest was outstanding.

4. Whether, by virtue of the fact that the accessoryship count at one point mistakenly referred to the principal offense (which was otherwise correctly described) as conspiracy to organize a society for "the overthrow" (rather than "advocating the overthrow") of the Government by force, petitioners were not adequately apprised of the nature of the charge against them; and whether, because of the same error, there was a fatal variance between the pleading and the proof.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and three of the statutes (18 U. S. C. 3, 371, and 1071) involved are set forth at pp. 3–4 of petitioners' brief. Another pertinent statute, 18 U. S. C. 3052 (as amended by the Act of January 10, 1951, c. 1221, § 1, 64 Stat. 1239), provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their

presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

STATEMENT

On September 16, 1953 (R. 9), a four-count indictment (R. 3–8) was filed in the United States District Court for the Northern District of California against the three petitioners involved herein—Shirley Kremen, Samuel Irving Coleman, and Sidney Steinberg—and two others, Carl Ross and Patricia Blau.[2] The first count (R. 3–4) charged all five of these individuals with accessoryship after the fact, in violation of 18 U. S. C. 3, to Robert G. Thompson's violation of the Smith Act (now 18 U. S. C. 2385), by receiving, relieving, comforting and assisting Thompson (at the time a fugitive from justice), knowing of his having been convicted of that offense.[3] The second count (R. 4–6) charged the same five individuals with conspiracy, in violation of 18 U. S. C. 371, to commit the offense charged in the first count. The third count (R. 6) charged four of the same individuals—all except Steinberg—with having harbored and concealed Steinberg in order to prevent his discovery and arrest, knowing that a warrant had been issued for his

[2] Blau was granted a judgment of acquittal at the end of the Government's case (R. 912). Ross was convicted, but, having completed his sentence, was not a party to the petition for certiorari (see Br. 6, fn. 7).

[3] After his apprehension in the company of the present petitioners, Thompson was convicted of criminal contempt and sentenced to a term of four years' imprisonment. *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841.

apprehension,[4] in violation of 18 U. S. C. 1071. The fourth count (R. 6–8) charged the same individuals named in the third count with conspiracy to commit the offense charged in that count. Thompson was named in the fourth count as a "co-conspirator but not as a defendant" (R. 7).

At the time of the commission of the offenses alleged in the indictment, both Thompson and Steinberg were fugitives from justice. Thompson was one of the eleven Communist Party leaders who had been convicted in the widely publicized New York prosecution which culminated in *Dennis* v. *United States*, 341 U. S. 494 (R. 893). Pending his appeal from that conviction, Thompson had been admitted to bail. After his conviction had been affirmed by the Second Circuit and this Court, Thompson fled rather than surrender to serve his sentence, thereby forfeiting bail in the amount of $20,000. Upon Thompson's failure to surrender himself, a warrant for his arrest was issued on July 2, 1951 (R. 894). Steinberg (under the name of Sidney Stein) was one of 20 individuals who had been indicted in the Southern District of New York, on June 19, 1951, charged with conspiracy to violate the Smith Act (R. 893). A bench warrant had been issued for his arrest (R. 892–893), but he and three others of those named in the indictment could not be located and apprehended at the time. After a widely publicized trial, thirteen of Steinberg's co-defendants in that case were convicted.[5]

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[4] For violation of the Smith Act.

[5] These convictions were subsequently affirmed in the case of *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909.

Despite intensive efforts by the Federal Bureau of Investigation to find them, both Thompson and petitioner Steinberg remained at large until their apprehension by agents of the Bureau on August 27, 1953, at a secluded cabin in the Sierra Nevada mountains, near the small village of Twain Harte, California, in the company of Ross and petitioners Kremen and Coleman (R. 201, 340, 421–422).

Thompson, Steinberg, Ross, and Coleman were all long-time intimates. They all had offices in the same building, the New York headquarters of the Communist Party, at approximately the same time (R. 509–512, 516). Steinberg, Ross, and Coleman were all identified as having been with or in the presence of Thompson on numerous occasions, including Party conventions and meetings (R. 519–523, 855–856, 857). At approximately the time that Thompson and Steinberg became fugitives from justice, Coleman and Ross left their families and homes (R. 609–615).

On June 20, 1953, petitioner Kremen, under the assumed name of Mrs. Lee Kaplan (R. 619–621), rented the cabin near Twain Harte. She specified that she wanted "a spot where it would be quiet and rather secluded" for her "brother", who, she told the real estate broker, was "sick with nerves" (R. 620). In renting this particular cabin, she stated that she liked it because it was "very quiet" (R. 621).[6]

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[6] Petitioners' attorney subjected the real estate agent to a lengthy and repetitious cross-examination which covered more than thirty pages (R. 627–656, 662–665). The trial judge finally limited the cross-examination of this witness on the ground that it had "come to the point of badgering" (R. 654).

Petitioner Steinberg identified himself to the owner of the cabin as "Mr. Newberg" and petitioner Kremen as his "sister" (R. 669–670). He introduced Ross as a "buddy" of his (R. 671). Steinberg, who seemed to be the host or master of the household at the cabin, once extended an invitation to the owner, Mr. Germany, to have breakfast (R. 669), and on another occasion he ordered Mrs. Kremen to pay Germany for a light bill (R. 671).

Petitioner Kremen was in charge of procurement and maintenance. In addition to renting the cabin initially, she paid the monthly rental (R. 621, 629), made several purchases of large quantities of food (R. 682–683, 778–781), performed various household tasks for the occupants of the cabin (R. 193–194, 669), hired a repairman to fix the cabin pump (R. 695), and saw that the automobiles were kept in good order (R. 787–789). On one occasion, she and a man attempted to purchase hair dye (R. 683).[7]

The evidence establishes that for several months prior to their arrest with the other occupants of the cabin on August 27, 1953, Thompson and petitioner Coleman had been traveling about together in several different states. On June 5, 1953, approximately two weeks prior to petitioner Kremen's renting of the cabin in Twain Harte (*supra*, p. 6), Coleman purchased a Hudson automobile in St. Louis, Missouri, under the assumed name of "William Gordon" (R.

[7] When apprehended, Thompson's hair was dyed red and he had a mustache which was dyed red (R. 326).

548, 549).[8] The keys to this car were found in Thompson's pocket when he was apprehended (R. 430, 555, 558). On July 4, 1953, Coleman (again under the name of "Gordon") and Thompson were members of a party of four which rented boats at a resort in Camdenton, Missouri (R. 565, 576). On August 10, 1953, Thompson purchased a fishing license in Bigfork, Montana, under the assumed name of "J. F. Brennan" (R. 596–597). From August 10 to August 17, 1953, Thompson and Coleman, still using their assumed names, stayed at a cabin in Polson, Montana, some 30 miles from Bigfork (R. 601). In driving to Polson, they used a Hudson automobile with Missouri license plates (R. 602). On August 20, 1953, seven days prior to the arrests at Twain Harte, the Hudson automobile which "Gordon" (Coleman) had purchased in Missouri entered California from Oregon at Dorris, California (R. 408–410, 412, 419).

On August 27, 1953, within thirty minutes after agents of the Federal Bureau of Investigation, who had had the Twain Harte cabin under surveillance for approximately 23 hours (R. 271, 525–529),[9] had positively identified Thompson and Steinberg as occupants of the cabin (R. 197, 323–324), they, together with the other occupants—Ross and petitioners Kremen and Coleman—were arrested by the agents. The arrests of Thompson and Steinberg were made pursuant to outstanding warrants for their arrest which had been

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[8] Coleman stated that he wante he car "as soon as possible" and paid for it in cash (R. 549).

[9] It was only during the last six hours of this period, however, that the surveillance was continuous (R. 271–272).

issued by the United States District Court for the Southern District of New York (*supra*, p. 5). At the time of the arrests, which occurred shortly after 1 o'clock in the afternoon (R. 272), Thompson and petitioner Steinberg were outside and immediately in front of the cabin; Ross and petitioners Kremen and Coleman were inside the cabin (R. 201). It was apparent that all five had spent the night at the cabin and were well established there (R. 189, 192–195, 210–212; G. Exs. 14–18, A–1 through A–14). Both Thompson and Steinberg had altered their physical appearances considerably during the two-year period in which they had been fugitives. Thompson had dyed his hair red, had gained much weight, and had grown a mustache (R. 325–326). Steinberg had cropped his hair short, had also grown a mustache, and was much thinner in face and body (R. 325). Although none of the occupants of the cabin had any visible means of support when apprehended, Thompson's wallet contained approximately $363 (R. 432), and approximately $450 was found in a belt on a chair in the cabin (R. 376–377).

The F. B. I. agents made a search of the cabin and of the persons of the five arrested individuals in order to find "anything that would be a fruit of the crime or a part of the crime" (R. 107), and seized two automobiles which were parked on the cabin premises (R. 118). Thompson and petitioner Steinberg had elaborate documentary proof of false identities. A wallet found in Thompson's pocket contained twelve documents identifying him as "John F. Brennan" (R. 432–434; G. Ex. 97). When asked if he had

any personal possessions in the cabin, Steinberg pointed out a wallet in the cabin as being his (R. 330–331). It contained false identification materials purporting to establish his identity as "Joshua Newberg", supposedly a teacher of violin and mandolin (R. 331–336). Other such "Joshua Newberg" identification documents were also found in the cabin (R. 232; G. Ex. 23, 24, 25).

Petitioner Kremen's purse contained a library card, a fire permit, a Social Security card, an identification card, and an automobile operator's license, all in the name of "Lee Kaplan"; she also had some bills and an invoice containing the name of "Richard Kaplan" (R. 362–363; G. Ex. 86). False identification documents for "William Gordon", the name assumed by petitioner Coleman (R. 548, 549, 575–576), were contained in a wallet found in the cabin (R. 899).

Ross was positively identified as the purchaser of a duplicating machine which was found in the cabin at the time of the arrests (R. 718–720),[10] as well as of some supplies which had been purchased under the name of "R. E. Newman" (R. 716, 718, 720; G. Ex. 114, 115). In addition, a Social Security card, a driver's license, and various identification documents, all in the name of "Robert Newman", were found in

[10] The use to which such a machine can be put was demonstated at the hearings which were held on P. L. 557, 83d Cong., 2d Sess. See *Communist Underground Printing Facilities and Illegal Propaganda*, Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, Senate, 83d Cong., 1st Sess. See also H. Rep. 2194 and Sen. Rep. 1433, 83d Cong., 2d Sess.

a billfold in the cabin (R. 379, 899–901, G. Ex. 91).[11] A letter found on Ross' person indicated that he was to meet someone and receive instructions (R. 208; G. Ex. 7).[12] He also had on his person a grocery list for large quantities of food (R. 207–208).

At the time of the arrest, the special agent in charge asked petitioners to identify any property belonging to them and to specify if there was anything they wanted the F. B. I. to take care of (R. 214–215). Petitioners, however, merely stood mute (R. 215; see also R. 102). All items of personal property found in the cabin, exclusive of furniture, were transported, later that afternoon, to the F. B. I.'s headquarters in San Francisco (R. 104–105), and agents were left at the cabin to guard the premises against intruders (R. 392–393).

On February 4, 1954 (R. 21), petitioners and Ross filed a "motion for the return of seized property" (R. 18–21), asking that "all clothing, books, papers, documents, or other tangible objects obtained from the possession of the [movants] in the cabin located in the vicinity of Twain Harte * * * be returned" to

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[11] A document in this billfold contained the following cryptic information (R. 900; G. Ex. 91):

Local Police Rear of libe ref room.
Atlas open to map of California.
Person entering carries Colliers.

[12] The pertinent portion of the letter reads as follows:

The person on this end of arrangement is being instructed to break off with your lady until he makes certain other arrangements. As previously agreed, contact from your end to be with S, with whom we are in contact. S will explain further and make necessary further arrangements.

them (R. 18–19). Attached to the motion was an affidavit of petitioner Steinberg (R. 19–21), purporting to be made on behalf of himself and the other three movants (R. 19), in which he alleged, in conclusory language, that the search in question had been "unwarranted and illegal" (R. 20). The Government moved to strike the motion on the ground that it failed to state facts sufficient to warrant the relief prayed for (R. 72; see R. 26–27). On February 9, 1954, the Government's motion to strike was granted and the motion for return of the seized property denied (R. 28, 72) on the ground that the affiant, Steinberg, whose affidavit was the only one filed in support of the motion (R. 27)—

> * * * does not allege that he owned or otherwise lawfully occupied the premises searched; nor does he identify the items of property seized, if any, which he, rather than the other defendants or third parties, owned or had in his possession.
>
> * * * Moreover, the Court is unwilling to accept an affidavit made by defendant Steinberg in support of alleged Constitutional violations suffered by the other defendants.

The court's order of denial directed that the Government furnish the movants with a copy of "the summarized list of items seized" which had been furnished to the United States Attorney by the F. B. I. (R. 28), which was done (R. 109; D. Ex. A [Appendix to petitioners' brief, pp. i–xxiv]). The court's direction to make the summary available was for the stated purpose of aiding the movants in the event that

they should "choose to renew this motion buttressed by a proper showing" (R. 28).

So far as can be determined from the record, Steinberg did not thereafter amend his affidavit or file a new affidavit, nor did any of the other movants file affidavits. On March 26, 1954, however (R. 23), petitioner Kremen filed a "motion for the return of seized property and its suppression as evidence" (R. 22–23), asking for the return to her of "all money, clothing, books, papers, documents or other tangible objects" seized from the Twain Harte cabin, which was described as a "residence * * * leased to" her, and that such property "be suppressed as evidence in this proceeding as against the defendants or any of them" (R. 22). So far as appears from the record, no supporting affidavit accompanied this motion. Thereafter, on April 6, 1954, following a hearing which included the taking of some testimony (R. 89–139), the motion was ordered removed from the calendar by stipulation of counsel (R. 73). During the course of the hearing on the motion, counsel for the Government informed the court that the two automobiles which had been seized on the cabin premises on the day of the arrests (see *supra*, p. 9) had been returned to their registered owners (persons other than any of the defendants in this case), but that the government authorities had "never found out to this day who wants any of the rest of this property" or "who owns any particular part of this property" (R.

128).[13] It does not appear that any other pre-trial motion for the return of the seized property, or for the suppression of its use as evidence, was thereafter filed.[14] However, during the trial, which commenced on April 12, 1954 (R. 73), counsel for petitioners moved to suppress and exclude various items of evidence as they were offered on the ground that they had been "illegally seized" (see, *e. g.*, R. 202, 204, 216, 217, 219, 220, 228, 231). All of these motions were denied.

Each of the petitioners and Ross (see fn. 2, *supra*, p. 4) was found guilty on each of the counts in which he was named. Petitioner Kremen was sentenced to one year's imprisonment on each of counts 1 and 2, and to six months' imprisonment on each of counts 3 and 4, all four sentences to run concurrently (R. 62–63). Petitioner Coleman's sentence was the same, except that the terms of imprisonment were made cumulative, resulting in a total of three years (R. 67–69). Petitioner Steinberg was sentenced to two years' imprisonment on count 1 and one year's

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[13] With the exception of certain items which had been "identified by Shirley Kremen as her personal property and returned to her on September 25, 1953" (Appendix to petitioners' brief, p. xix).

[14] The record indicates that there was a subsequent "motion to return seized property and * * * to suppress evidence" (R. 164), which was heard (R. 164–180) and denied (R. 73) on April 13, 1954, shortly after the beginning of the trial (R. 73), but this motion, which is not contained in the record, appears to have been concerned with a search which is not here in issue, *viz.*, the search of an automobile incident to the arrest of the subsequently acquitted defendant, Patricia Blau (see fn. 2, *supra*, p. 4).

imprisonment on count 2, to run consecutively, *i. e.*, a total of three years (R. 69–71).

SUMMARY OF ARGUMENT

I

None of the search-and-seizure questions raised by petitioners should be reached. Petitioners, by carefully refraining from asserting any property interest in the items seized, failed to make a showing sufficient to raise the issue of their right to have the seized property suppressed (*United States* v. *Jeffers*, 342 U. S. 48), though they were invited by the District Court and given every opportunity to make such showing. Their piecemeal motions to suppress, made during the trial as individual items of evidence were offered, were properly denied on the additional ground of substantial non-compliance with Rule 41 (e) of the Federal Rules of Criminal Procedure, requiring that a motion to suppress be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion.

II

In any event, the search and seizure were lawful incidents to valid arrests.

A. The arrests were valid. The arrests of Thompson and petitioner Steinberg were made pursuant to outstanding warrants for their arrest. Petitioners Kremen and Coleman and the other occupant of the cabin, Ross, were lawfully arrested without warrants because the officers had probable cause to believe that

they were harboring fugitives from justice (Thompson and Steinberg) in the officers' presence, in addition to committing the felony of accessoryship after the fact to Thompson's violation of the Smith Act, likewise in their presence. With respect to the latter arrests, it was not necessary that there should have been a "likelihood of escape" (though there was in fact such likelihood here), since Congress specifically eliminated that requirement by the 1951 amendment of the pertinent statute. And it was not necessary for the officers to see the cabin's occupants performing acts which were illegal *per se* in order to have probable cause to believe them guilty of committing a felony in their presence. Nor was it necessary for the officers to exclude every hypothesis of innocence before acting.

B. The search of petitioners and of the premises was a lawful incident to the arrests.

(1) The question of the legality of the search is governed by the rationale of those cases which have upheld warrantless searches of premises within the immediate control of persons lawfully arrested, for the purpose of finding the fruits or instrumentalities of the crime. *United States* v. *Rabinowitz*, 339 U. S. 56; *Harris* v. *United States*, 331 U. S. 145. Prior to the surveillance, the officers did not have sufficient knowledge to give them the probable cause necessary to procure a search warrant. Once the fugitives, Thompson and petitioner Steinberg, were positively identified (through the surveillance) as two of the cabin's occupants, delay might have been fatal. It is not sound to argue that, after making these identi-

fications, the officers could have prevented flight or the removal or destruction of property "by guarding the premises until one of their number had obtained warrants." If the officers had sufficient information on which to arrest petitioners if they attempted to flee, they had enough information to arrest them forthwith and to search the premises incidentally thereto.

(2) The area of search was reasonable in relation to the crime observed. There is no precise mathematical test of reasonableness. Each case must be judged on its own facts and circumstances. Here, petitioners were in exclusive possession of the cabin. Their control extended not only to every room in the cabin, but also to the grounds. The search of the entire cabin and grounds was therefore reasonable and lawful under the decisions of this Court sustaining the legality of similar searches in comparable factual settings. The entire cabin itself was a prime instrumentality of the observed crime of harboring and concealing the fugitives.

(3) The search was not oppressively or abusively conducted and its thoroughness was fully warranted by the circumstances. If, as we believe, it was permissible for the officers to search the cabin, it was also permissible, since full precautions were taken to inventory the property and to safeguard it, to remove it to a convenient place for completion of the search. A minute and painstaking search was necessary since the "tools" of the particular crimes involved were not things like contraband, weapons, gambling para-

phernalia, etc., but seemingly innocent things like false identification indicia.

(4) The search was not unreasonable because of the absence of "exceptional circumstances", such as resistance to arrest, attempted flight, or efforts to remove, conceal, or destroy property. The legality of a search without warrant incident to a valid arrest depends on none of these factors. There can be little doubt, in any event, that the only reason none of these things occurred was the alertness and alacrity of the officers.

(5) The search of the "outhouse" was also proper. This had been as much under petitioners' control as the cabin itself. Since it could have been searched at the time of the arrests, the fact that it was not searched until several days later can, on principle, make no difference. Moreover, since the premises were ininhabited and petitioners were in custody at the time of the search of the outhouse, the latter search involved no invasion of petitioners' privacy in any meaningful sense. The outhouse, in any event, was beyond the curtilage of the cabin, and the sole fruit of the search, beer cans bearing petitioners' fingerprints, could not have prejudiced them, since they do not deny their presence at the cabin.

III

Petitioners' convictions are not based on unconstitutional or otherwise invalid applications of the harboring, accessoryship, and conspiracy statutes.

A. The convictions do not involve "an unconstitutional pyramiding of offenses."

1. It is not correct, as petitioners Kremen and Coleman claim, that there was at most one substantive offense because "all of the proof which established the harboring of Steinberg also established the accessory-ship after the fact to the Thompson conviction." Among other elements requiring proof under the one count but not the other was the obviously important element of the identity of the recipient of the aid and comfort—Steinberg in one count, and Thompson in the other.

2. The convictions under the conspiracy counts were not the result, as petitioners Kremen and Coleman claim, of a "splitting" into "two separate conspiracies" of "what was at most a single conspiracy." The evidence warranted the jury in concluding that there were two separate and distinct conspiracies, formed at different times and places and with different original members. Kremen and Coleman were ultimate (but not original) members of both conspiracies. One of the conspiracies involved comforting and assisting the fugitive Thompson, the other the harboring and concealing of the fugitive Steinberg. The two conspiracies became linked up when Thompson and petitioner Coleman arrived at the cabin a day or two prior to the arrests (the members of the other conspiracy having been at the cabin all summer), but this did not result in the two conspiracies' losing their identities or coalescing into one.

3. The offense charged in each of the conspiracy counts is not the same offense as that charged in the corresponding substantive count. Conspiracy to com-

mit an offense is distinct from the substantive offense which is the object of the conspiracy, and may be separately punished. It is only where the agreement of two persons is necessary for completion of the substantive crime that a conspiracy charge may not be added to the substantive charge. *Pinkerton* v. *United States,* 328 U. S. 640. This principle has no applicability here since, as petitioners concede, each of the two substantive offenses involved—accessoryship after the fact and harboring—may be committed by one person alone.

B. Receiving and assisting one who, having already been convicted of an offense against the United States, has fled from justice, in order to hinder and prevent his apprehension and punishment, constitutes, within the meaning of 18 U. S. C. 3, accessoryship after the fact to the offense of which the fugitive was convicted. The explicit language of the accessoryship statute ("* * * in order to hinder or prevent [the principal offender's] apprehension, trial or punishment * * *") requires this result, which was also the rule at common law. *Rex* v. *Burridge,* 3 P. Wms. 439, 24 Eng. Reprint 1133.

C. The element of *scienter* was clearly proven against all petitioners. *Scienter* may be, and usually is, inferred from circumstantial evidence. In the light of all the circumstances here shown, the jury was amply justified in concluding that petitioners were well aware of Thompson's and Steinberg's fugitive status.

IV

The fact that the accessoryship count at one point mistakenly referred to the principal offense (which was otherwise correctly described and identified by the sections of the Smith Act violated) as conspiracy to organize a society for "the overthrow" (rather than "advocating the overthrow") of the Government by force did not prejudice petitioners, who were clearly apprised of the nature of the charge. Any error, defect, irregularity, or variance which does not affect substantial rights is to be disregarded. Rule 52 (a), F. R. Crim. P.

ARGUMENT

I

NONE OF THE SEARCH-AND-SEIZURE QUESTIONS RAISED BY PETITIONERS SHOULD BE REACHED. PETITIONERS UTTERLY FAILED TO MAKE A SHOWING SUFFICIENT TO RAISE THE ISSUE OF THEIR RIGHT TO HAVE THE SEIZED PROPERTY SUPPRESSED, THOUGH INVITED BY THE DISTRICT COURT AND GIVEN EVERY OPPORTUNITY TO MAKE SUCH SHOWING

In *United States* v. *Jeffers*, 342 U. S. 48, this Court held that the owner of property which had been unlawfully seized was entitled to have the same suppressed for use in evidence against him even though he had no proprietary or leasehold interest in the premises from which the goods were seized (a hotel room occupied by the defendant's aunts), at least where he had received from the lawful occupants of the premises the right of free access thereto. We

shall assume that, under the rationale of *Jeffers*, each of the petitioners had standing to object to any unlawful seizure from the premises here in question of any property owned by him, even though petitioner Kremen alone had a proprietary interest (that of lessee) in the cabin (*supra*, pp. 6, 13).

No petitioner, however, had standing to object to the seizure from the premises of any property *not* owned by him. See *Jeffers*, *supra*, at 54; *Wilson* v. *United States*, 218 F. 2d 754, 756 (C. A. 10), and cases cited; *Steeber* v. *United States*, 198 F. 2d 615, 617 (C. A. 10); *United States* v. *Eversole*, 209 F. 2d 766 (C. A. 7); *Scoggins* v. *United States*, 202 F. 2d 211 (C. A. D. C.); *Gaskins* v. *United States*, 218 F. 2d 47 (C. A. D. C.); cf. *Agnello* v. *United States*, 269 U. S. 20, 35; *Goldstein* v. *United States*, 316 U. S. 114, 121. In this case, none of the petitioners made claim to the ownership of any of articles seized at the cabin which were introduced in evidence (see *supra*, pp. 11–14). In fact, the record reflects that each has carefully refrained from asserting any property interest in the items seized. The District Court, in denying petitioners' motion of February 4, 1954, for return of the seized property (*supra*, pp. 11–12), explicitly based its order of denial on the fact that none of the moving parties (which included petitioners) had asserted any property interest in any of the items (*supra*, p. 12). The court invited the movants to remedy this fundamental defect (for which purpose it directed the Government to produce its list of the items involved) and to renew the motion upon a proper showing (*supra*, pp. 12–13). But petitioners have eschewed this course,

and the defect has never been remedied (see *supra*, pp. 13–14). In these circumstances, the denial of the February 4 motion, as well as of petitioners' subsequent piecemeal motions to suppress, made during the trial as items of evidence were offered (*supra*, p. 14), was clearly correct.

Furthermore, apart from the fact of petitioners' failure to lay claim to ownership of any of the seized properties, their piecemeal motions to suppress were properly denied for failure to comply with Rule 41 (e) of the Federal Rules of Criminal Procedure. That rule provides:

> (e) *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * *. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. * * * *The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion,* but the court in its discretion may entertain the motion at the trial or hearing. [Emphasis added.]

It is evident here that there was ample opportunity for petitioners to have filed proper motions to suppress before the trial, and that petitioners were well

aware, at such time, of whatever grounds may have existed for such motions. Their failure to file such proper pre-trial motions, therefore, amounted to substantial non-compliance with Rule 41 (e), and, for this reason alone, warranted the trial court in refusing to hear the piecemeal motions as they were made during the trial.[15]

II

IN ANY EVENT, THE SEARCH AND SEIZURE WERE LAWFUL INCIDENTS TO VALID ARRESTS

Assuming that petitioners have standing to challenge the legality of the search and seizure in question (but see *supra*, pp. 21–24), their contention (Br. 27–57) that the search and seizure were unlawful cannot be sustained. The search and seizure were lawful incidents to valid arrests.

A. THE ARRESTS WERE VALID

Petitioners Kremen and Coleman argue (Br. 26–37) that their arrests were invalid [16] because the officers did not have sufficient cause for believing that

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[15] The record does not reflect the ground on which these motions were denied. It simply indicates that each was denied. In view of the ground on which the pre-trial motion was denied, however (*supra*, p. 12), it can reasonably be assumed that the petitioners' failure to comply with Rule 41 (e) by making adequate pre-trial motions was in part, at least, the basis of the court's denial of their motions made during the trial.

[16] The arrest of Steinberg was made pursuant to a valid bench warrant issued for his arrest in New York on June 20, 1951 (R. 900, 901), and is not in issue here.

these petitioners were committing a felony in their presence to justify an arrest without warrants.[17]

Arrests without warrant for crimes which the arresting officers have probable cause to believe are being committed in their presence are frequently made by law enforcement officers. Innumerable decisions of this Court and of the lower federal courts have passed upon the validity of such arrests. As this Court has frequently observed, there is no precise formula for determining the existence of probable cause. The validity of any such arrest must be determined solely by its reasonableness in the light of the facts and circumstances of the particular case. *United States* v. *Rabinowitz,* 339 U. S. 56, 60.

The general criteria are well settled. The accepted definitions of probable cause are those adopted by this

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[17] In support of their claim (Br. 18) that the agents had time to procure warrants, petitioners assert the preparations began at least 72 hours before the raid (Br. 18). They point out that two agents who participated in the raid and were acquainted with Thompson and petitioner Steinberg arrived in San Francisco two days before the raid (*ibid.;* R. 352, 438). Petitioners do not and cannot challenge the arrest of Thompson and Steinberg because warrants were outstanding for their arrest. The agents were not required (see Br. 26, fn. 27) to have the warrants in their possession. Rule 4 (c) (3), F. R. Crim. Proc. So far as petitioners Kremen and Coleman are concerned, it is apparent from the record that the agents did not know their identity until after their arrest (R. 273–274). (They were not certain of the identities of even Thompson and Steinberg until thirty minutes prior to the arrests (*supra,* p. 8).) It is doubtful, therefore, whether the agents could have described Kremen and Coleman with the degree of "reasonable certainty" required to obtain a warrant. Rule 4 (b) (1), F. R. Crim. Proc.; see *West* v. *Cabell,* 153 U. S. 78.

Court, many years ago, in *Stacey* v. *Emery*, 97 U. S. 642, 645:

> * * * A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged.
>
> * * * Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty. * * *

In *Brinegar* v. *United States*, 338 U. S. 160, 172–176, this Court emphasized that probable cause is a matter of probabilities; that the standard of proof required for probable cause is far less stringent than that required to establish guilt; and that nothing more is required to justify an arrest than that the circumstances known to the officers, by personal observation or by information, be such as would justify a man of reasonable caution in the belief that a felony is being committed. The ultimate question becomes, therefore: Were the facts and circumstances within the knowledge of the arresting officers sufficient in themselves to warrant a man of reasonable caution in the belief that a felony had been committed or was being committed in his presence?

An agent of the FBI may lawfully arrest without a warrant any person who commits *any* offense against the United States in his presence. He may also arrest without a warrant for any federal felony if he has reasonable grounds to believe that the person to be arrested "is committing such felony." 18 U. S. C. 3052

(*supra*, pp. 3–4). Petitioners' complaint (Br. 29, 35) that another element—the likelihood of escape—is necessary to allow an agent of the FBI to arrest for a crime committed in his presence is without merit. While this may have been required prior to January 1951, it certainly has not been a requirement since that date. Congress amended the former statute for the express purpose of eliminating "the likelihood of * * * escap[e]" requirement, because it could see no valid reason why FBI agents should not have at least the same authority as marshals and their deputies to make arrests without warrant and because it desired to free FBI agents of the restrictions imposed by the decision in *United States* v. *Coplon*, 185 F. 2d 629 (C. A. 2), certiorari denied, 342 U. S. 920 (Br. 56). See Sen. Rep. No. 2464, 81st Cong., 2d sess., and H. Rep. No. 3228, 81st Cong., 2d sess., both on S. 3945; 96 Cong. Rec. 14660, 16934. There is therefore no need to consider the elements necessary to permit a private person in California to arrest without a warrant, or whether the element of "likelihood of escape" by petitioners was here present.[18]

Applying these principles to the facts here presented, we submit that, as a matter of law, the arrests without warrant of petitioners Kremen and Coleman

[18] The facts, however, that two of the cabin's occupants were fugitives from justice who had materially altered their appearances and had avoided apprehension for over two years, that the other occupants appeared to be harboring these fugitives, and that two automobiles were present near the cabin would suffice, we think, if the "likelihood of escape" element were relevant, to establish its presence here.

were quite as valid as the arrests (under warrants) of Thompson and petitioner Steinberg. As already noted, the agents were not positive that Thompson and Steinberg were among those at the cabin until thirty minutes before the arrests (R. 197). Until these fugitives had been identified, the agents did not have probable cause to make any arrest. Once the fugitives were identified, there was certainly probable cause to believe that a federal crime was being committed in the very presence of the agents.[19] Since Thompson and petitioner Steinberg had successfully evaded apprehension for more than two years, despite intensive efforts by the FBI to locate them, and there were two automobiles near the cabin that could be used by those present to escape, the agents would have been derelict in their duty if they had delayed in making the arrests. Thompson and Steinberg were arrested together with "others there that it can be said could be part of the harboring process" (R. 111). In the circumstances facing them, the agents cannot reasonably be said to have been required to travel from remote Twain Harte in the Sierra Nevada mountains to the nearest United States Commissioner or District Judge, and back again (a total distance of at least 120 miles), before making the arrests.

Equally without merit is petitioners' contention (Br. 27) that, since the agents did not witness them performing acts which were illegal *per se*, the agents had no probable cause to believe a felony had been

[19] Both harboring and accessoryship after the fact are "offenses against the United States"; indeed, accessoryship after the fact to a violation of the Smith Act is a felony.

or was being committed. It is naive to say that, to give aid and comfort to a fugitive from justice, one must commit acts in themselves criminal. An indispensable condition of successful commission of the crime of accessoryship after the fact to Thompson's offense by aiding and harboring him was that the aiding and harboring activities should appear innocent to a casual observer.

Similarly untenable is the argument (Br. 34–35) that the arrests of petitioners Kremen and Coleman were unlawful because the arresting officers had not witnessed anything, prior to the arrests, that would cause them to believe that these petitioners had the "*scienter* or mental state" required for the crime for which they were arrested. Obviously an arresting officer need not probe the "mental state" of the suspect before acting. Such a requirement would virtually destroy the power to effect a summary arrest and defeat the purpose which underlies the power. Accordingly, all that has ever been required is that what appears to be a crime be committed in the presence of the officer; in other words, that the officer have reasonable cause to believe, in the light of all the attendant circumstances, that a felony is *probably* being committed in his presence. From their own observations, the agents here certainly had good reason to believe petitioners were receiving, relieving, comforting, and assisting fugitives from justice. Indeed, petitioner Kremen was seen administering to the care and comfort of the occupants of the cabin (R. 193–194).

That petitioners might conceivably have been with the fugitives for some legitimate or innocent reason was not the determining criterion of the legality of the arrests. It is not necessary to exclude every hypothesis of innocence in determining whether probable cause sufficient to arrest without a warrant exists. *United States* v. *Bianco*, 189 F. 2d 716, 720 (C. A. 3).[20] The question is whether the inference which the agents drew was a *reasonable* one. In the light of the knowledge which the agents had obtained by personal observation of the cabin, they were bound to conclude that there was at least a high degree of *probability* that petitioners were accessories after the fact to Thompson's offense, especially since one of them (Steinberg) was himself a fugitive from justice charged in an outstanding indictment as a co-conspirator of Thompson. Petitioners' arguments overlook the fact that the reasonable or probable cause "necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial." *United States* v. *Heitner*, 149 F. 2d 105, 106, (C. A. 2).[21]

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[20] In *Brinegar*, *supra*, 338 U. S. 160, the circumstances which presented themselves to the arresting officers at the time of the arrests did not exclude every hypothesis consistent with innocence. Driving along a highway is an innocent act in and of itself; it does not necessarily follow that one who broke the law once would do it again; and it was quite possible that the automobile was weighted down by something innocent rather than by illegal liquor.

[21] The case of *Fulbright* v. *United States*, 91 F. 2d 210 (C. A. 8), relied upon by petitioners (Br. 34), is inapplicable because that case, while involving the crime of accessoryship after the fact, did not involve the issue of probable cause necessary to sustain an arrest without a warrant. In *United States* v. *Di Re*, 332 U. S.

B. THE SEARCH OF PETITIONERS AND OF THE PREMISES WAS A LAWFUL INCIDENT TO LAWFUL ARRESTS

Petitioners assail the search because it was made without a warrant and because it was incident to allegedly invalid arrests (Br. 37–57). They further argue that, even if the arrests were valid, the search, for various reasons, was so unreasonable as to be violative of the Fourth Amendment. We urge, on the contrary, that the search was incidental to lawful arrests and that it was a valid and reasonable exercise of the officers' authority.

(1) To petitioners' contention that a search warrant should have been obtained before surveillance of the cabin began, the short answer is that the agents did not have sufficient knowledge prior to the surveillance to give them the "probable cause" necessary to procure a search warrant. Until positive identification of Thompson and petitioner Steinberg had been made, the agents had no adequate basis for obtaining one. Once the identification had been made, delay might well have been fatal (*supra*, p. 28). To contend, on the other hand, as petitioners also do (Br. 56), that, when identification had been made, the agents could have prevented flight or the removal or destruction of property "by guarding the premises until one of their number had obtained warrants"

581, also relied on by petitioners, Br. 28, 29, 35); the crime involved the selling of gas ration coupons, an act illegal *per se*. As we have pointed out (*supra*, pp. 28–29), the acts of giving aid and comfort which constitute accessoryship after the fact (and harboring) need not be illegal *per se*; they are illegal because the person assisted has been convicted of or has committed a crime.

is to beg the question. If the officers had sufficient information on which to arrest petitioners if they attempted to flee, they had enough information to arrest them forthwith (see *supra*, pp. 24–30) and to search the premises as an incident thereto. This Court, in *United States* v. *Rabinowitz*, 339 U. S. 56, 65, laid down the following rule:

> A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. *Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.* [Emphasis added.]
>
> * * * The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. * * *

The *Rabinowitz* decision expressly overruled *Trupiano* v. *United States*, 334 U. S. 699, to the extent that the latter decision made the legality of a warrantless search depend "solely upon the basis of the practicability of procuring [a warrant] rather than upon the reasonableness of the search after a lawful arrest * * *" (339 U. S. at 66).

As we have already pointed out, there can be no question as to the validity of the arrests of Thompson and petitioner Steinberg, both of whom were arrested pursuant to valid warrants outstanding in the Southern District of New York. Nor can there be any question but that the crime of harboring was being committed in the presence of the FBI agents and that they also had probable cause to believe that all three petitioners were committing, in their presence, the felony of accessoryship after the fact to Thompson's violation of the Smith Act (see *supra*, pp. 27–30). As Judge Lemmon observed, in the principal affirming opinion in the Court of Appeals (R. 968–973), the search here falls within the rationale of those cases which have upheld a search without warrant of premises within the immediate control of a person legally arrested, for the purpose of finding the fruit of the crime or the instrumentalities through which it was carried out. *United States* v. *Rabinowitz*, 339 U. S. 56; *Harris* v. *United States*, 331 U. S. 145; *Marron* v. *United States*, 275 U. S. 192; *Agnello* v. *United States*, 269 U. S. 20, 30. The agents entered upon the premises because warrants were outstanding for the arrests of Thompson and petitioner Steinberg, and because their observation disclosed the probable commission by all petitioners of a felony in their presence. The agents

arrested Ross, Thompson, and the three petitioners. Thompson and petitioner Steinberg were arrested just outside the cabin. Ross and petitioners Kremen and Coleman were arrested inside the cabin. Immediately thereafter, as an incident to the lawful arrests of all five of these individuals (and certainly of the three arrested in the cabin), the agents searched the cabin for the purpose of finding "anything that would be a fruit of the crime or a part of the crime" (R. 107).

(2) Contrary to petitioners' assertions, the area of search was reasonable in relation to the crime observed, and therefore valid. There is no precise mathematical test of reasonableness. "Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Company* v. *United States*, 282 U. S. 344, 357. Petitioners were in exclusive possession of the cabin. Their control extended not only to every room in the cabin, but also to the grounds. The fact that the cabin was rented does not distinguish this case from the other cases where searches of the immediate area have been upheld as incidents of valid arrests. In *Agnello* v. *United States*, 269 U. S. 20, the right of arresting officers "to search the place where the arrest is made" was held not to permit a search "several blocks distant from Alba's house, where the arrest was made" (*id.*, pp. 30–31), but it was held to justify the entry into and search of Alba's house, in which the officers, who had been watching through the windows, had observed an illicit

transaction in drugs.[22] In *Marron* v. *United States*, 275 U. S. 192, 199, upholding a search contemporaneous with a valid arrest for a crime committed in the presence of the arresting officers, this Court stated that the authority of the officers "to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose." In *Harris* v. *United States*, 331 U. S. 145, this Court again sustained the authority of arresting officers to search beyond the immediate place of arrest and to explore those places within the control of the person arrested, even in a situation where no crime was being committed in the presence of the arresting officers and where the only fruit of the five-hour search of the four-room apartment was evidence of an offense other than the crime for which the defendant had been apprehended.[23] See also *Matthews* v. *Correa*, 135 F. 2d 534 (C. A. 2). And even more recently, in *United States* v. *Rabinowitz*, 339 U. S. 56, which, to be sure, involved only a search of a one-room office, this Court cited with approval the *Agnello*,

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[22] The record of that case shows that the search involved four rooms; the agents entered through the kitchen, and found the packages of narcotics on the table in the dining room, where the men were arrested, and in one bedroom. One agent testified that he "searched all around the place." (Record, No. 6, O. T. 1925, pp. 62, 129, 219.)

[23] In *Harris* (331 U. S. at 152, fn. 16), this Court cited with approval *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. A. 2), certiorari denied, 323 U. S. 761. There, Judge Clark, speaking for a unanimous court, and after reviewing the leading cases, said (*id.* at 832): "The better view as to area is that the search can cover that part of the premises over which the offender's control and unlawful activities likely extended."

Marron, and *Harris* cases. Again, the Court noted that there is no fixed formula of reasonableness in such situations; that the facts of each particular case are for the trial court to evaluate in their totality (*id.* at 63).[24]

In the context of one case, it might be that the area of permissible search would not extend from the room of arrest to the next room; in another, the facts might justify a more extensive search than the four-room search involved in the *Harris* case (see 331 U. S. at 152). Certainly, the reasonableness of a search cannot be determined solely on the basis of the square footage of the area, or the fortuitous circumstance that the arrest may have been made in the doorway or the living room rather than a few feet away in the front yard. What is more important is whether the part of the premises searched was within the control of the person or persons arrested, and whether such area was being used for the unlawful purpose for which the accused was arrested.

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[24] This Court, in *Rabinowitz*, cited several factors which justified the conclusion of the District Court that the search and seizure had been reasonable in that factual setting (339 U. S. at 64). Petitioners suggest (Br. 49) that this case should be evaluated in relation to those factors alone. Their suggestion, however, is not sustained by the *Rabinowitz* opinion. In one respect the instant facts are even stronger than in *Rabinowitz*. Here a felony was being committed in the immediate presence of the arresting officers, whereas in *Rabinowitz* the facts showing probable cause to justify the issuance of the arrest warrants and the incidental search without search-warrant of the business premises had been gleaned over a week before the arrest. This same distinction might be made as regards the *Harris* case, involving a search of private premises.

Marron v. *United States, supra,* 275 U. S. at 199. In an analagous situation, where a defendant was apprehended about a hundred feet away from a barn which was reasonably believed by federal officers to be used as a distillery, the Court of Appeals for the Eighth Circuit, in sustaining the subsequent search of the barn, stated (*Kelley* v. *United States,* 61 F. 2d 843, 847):

> It is contended there was no right to search the barn, it not being the place of arrest, and counsel relies on Agnello v. United States, supra, where the court speaks of the right without a search warrant contemporaneously to search persons lawfully arrested "while committing crime and to search the place where the arrest is made," etc., and counsel argues that the right does not extend to other than the immediate place of arrest. In the Agnello case, Agnello's house, which was the subject of the search, was several blocks distant from the place where the arrest was made, and when it was entered the conspiracy had terminated and defendants were under arrest and custody elsewhere. Surely the place of search is not the mere spot upon which a defendant stands when he is arrested. It would seem rather an affront to common sense to say that were officers on the outside of a building where a murder was being committed, heard shots and screams from within, observed a person running from the door with a smoking revolver in his hands, and they pursued him and arrested him within a hundred feet of the building where the crime was committed and from which he had fled, that they

could not search the building, but must be content with looking over the spot where the arrest actually took place.

The word "place" as used by the Supreme Court in the Agnello case certainly should be given no such narrow meaning as counsel seeks to give it here. The barn was in the immediate vicinity of the place where the arrest was made.

In the instant case, involving the offense of harboring and concealing fugitives, it was proper for the officers to search "all parts of the premises used for the unlawful purpose" (*Marron* v. *United States*, 275 U. S. 192, 199), since the entire cabin was itself a prime instrumentality of the crime.

(3) The search was not oppressively or abusively conducted and its comprehensive thoroughness was fully warranted by the circumstances.

Agent Whelan testified that petitioners were taken to the cabin and were allowed to pick up their clothes and anything else they desired (R. 102). They were also advised that if there was any property in the vicinity, inside or outside, of "a valuable nature or personal nature, since the place was located in the woods as it was, that if they would make it known we would locate it and try to safeguard it in some way" (R. 102).[25] Agents also remained at the prem-

[25] Petitioners introduced in evidence defendants' Exhibit A, a list of property which was taken by the FBI at the cabin. A portion of this property was returned to petitioner Kremen on September 25, 1953, according to the list (Appendix to Petitioners' Brief, pp. xix–xxiv). Petitioners did not identify any of the property in the cabin as belonging to any of them with the exception above noted. See *supra*, pp. 11–14.

ises until midnight to guard the premises from intruders (R. 392–393).

Petitioners state (Br. 40) that it was unreasonable for the agents to transfer the bulk of the cabin's contents to their San Francisco headquarters, instead of completing the search at the scene. But if, as we believe, it was permissible for the agents to search the cabin, it was also permissible, since full precautions were taken to inventory the property and to safeguard it, to remove it to a convenient place for completion of the search. Petitioners are unable to point to any prejudice which resulted from the fact that the agents completed their search, necessarily time-consuming and painstaking, at their San Francisco headquarters, rather than at the remote hideaway in the Sierra Nevada mountains.

The type of crime involved here, it should be emphasized, does not entail contraband, weapons, gambling paraphernalia, illicit liquor or things of like order. This is the kind of crime which singularly depends for its success upon the maintenance of an innocuous appearance. Thus, it involved here the use of seemingly innocent indicia of identification (serving to establish and give credence to false identities), notes making arrangements for meetings, the transmission of instructions in cryptic form, etc. In the very nature of things, it was necessary, in order to uncover the "tools" of the crime, to make a minute and painstaking search.

The fruits of the search which were introduced in evidence and are now pertinent[26] were some identification cards (G. Ex. 23), a social security card (G. Ex. 24), and a fishing license (G. Ex. 25), all in the name of "Joshua Newburg" (Steinberg); the wallets, and their contents, of petitioner Steinberg, Ross, and petitioner Coleman, with false identifying documents in the names of "Newberg", "Newman", and "Gordon", respectively (G. Exs. 82, 83, 90, and 91); and the contents of petitioner Kremen's purse, which included her false identification papers (G. Ex. 86). Thus, generally speaking, the only seized documents which were introduced were false identity papers which were used to safeguard Thompson and Steinberg from any risk that petitioners' true names would lead to the arrest of the fugitives and certain notes in the possession of Ross, who is not a petitioner. The false identification documents taken

[26] Government Exhibits 8–13, inclusive, had to do with the defendant Patricia Blau, who was acquitted. Government Exhibits 21 and 22 were some identification cards and a library card of the defendant Ross (under the name of "Newman"), who is not a party hereto. Government Exhibits 93 and 94 (a birth certificate and a union book) were secured from Thompson who likewise is not a party hereto. Government Exhibit 105 was not secured from the cabin, but was a public record of the state of Missouri (R. 541–542). Government Exhibit 92 was a box containing ten beer cans, found in the "outhouse", as to which see *infra*, pp. 42–43. Government Exhibits 111 and 112 were records of the real estate agent Morrow (see *supra*, p. 6) and were not secured at the cabin (R. 622–625). The remainder of the exhibits (exclusive of those referred to in the text following) were taken from petitioners' persons. A different rule has always applied to the search of the person of one arrested from that applicable to the search of premises. See *Weeks* v. *United States*, 232 U. S. 383.

during the search bear the same relation to petitioners' crimes as did the burglar tools, gambling paraphernalia, and illicit liquor to the crimes involved in the cases accepted as correct by petitioners. They were instrumentalities through which the crimes were carried out.[27]

(4) Petitioners also contend (Br. 52–57) that the search in this case was unreasonable because there were no "exceptional circumstances" present to justify a search without a warrant. They argue "that there was no show of violence by petitioners, no resistance to the arrest, no attempted flight, and no effort to remove, conceal or destroy property" (Br. 55). Under the decisions of this Court to which we have referred, however (*supra*, pp. 32–38), the legality of a search without warrant incident to a valid arrest does not depend on any of these factors. Moreover, the presence of two fugitives who had materially altered their appearances and the use of fabricated identities indicate that petitioners were not above fleeing or destroying and concealing property if given an opportunity to do so. There can be little doubt that the only reason that none of these things occurred was the alertness and alacrity of the agents in making the raid. The record, indeed, shows that petitioners' alleged co-conspirator Blau, who was acquitted by the court at the end of the Government's case (R. 912),

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[27] Certainly, papers, *per se*, as distinguished from other forms of property, have no special standing rendering them immune from search and seizure. Cf. *Gouled* v. *United States*, 255 U. S. 298, 309.

destroyed certain materials just prior to her apprehension (R. 733, 737, 751, 770; G. Ex. 116).

The situation here was entirely different from those involved in *Go-Bart Importing Co.* v. *United States*, 292 U. S. 344, and *United States* v. *Lefkowitz*, 285 U. S. 452, relied upon by petitioners (Br. 42, 48, 51). The Court found there that law enforcement agents had entered the premises ostensibly for the purpose of making an arrest, but in reality for the purpose of making a general exploratory search for evidentiary materials to connect the accused with some crime. The other cases relied upon by petitioners (Br. 35, 37, 42, 44, 53, 54, 56)—*United States* v *Di Re*, 332 U. S. 581 (officers had no suspicion a crime was being committed until *after* the search); *McDonald* v. *United States*, 335 U. S. 451 (defendant under surveillance for over two months)—are plainly distinguishable.

(5) Petitioners argue, finally (Br. 46, 55), that, whatever may be said of the search of the cabin proper, it was unlawful for the agents to search the cabin's "outhouse," several days following the arrests of petitioners. This outhouse, however, was as much under the control of petitioners as the cabin itself. And the fact that the search occurred several days after the arrests can, on principle, make no difference if it was proper to search it at the time of the arrests. This is especially true in view of the fact that, at the time of the search of the outhouse, the premises were completely uninhabited, all of petitioners' possessions had been removed from the

scene, and petitioners themselves were in custody. There was thus no invasion of petitioners' privacy in any meaningful sense of the term. Moreover, the outhouse was "[a]bout twenty feet in the rear of the cabin" and served no other purpose than to "house the garbage can" (R. 385).[28] It was thus outside the curtilage of the cabin. The protection of the Fourth Amendment does not apply to buildings thus detached from the residential structure. *Carney* v. *United States,* 163 F. 2d 784, 786 (C. A. 9), and cases cited. In any event, the sole fruit of the search of the outhouse was ten beer cans on which petitioners' fingerprints were found (G. Ex. 92). Since petitioners do not deny their presence and the presence of Thompson at the cabin, it is clear that this evidence could nowise have prejudiced them.

III

PETITIONERS' CONVICTIONS ARE NOT BASED ON UNCONSTITUTIONAL OR OTHERWISE INVALID APPLICATIONS OF THE HARBORING, ACCESSORYSHIP, AND CONSPIRACY STATUTES

Petitioners contend (Br. 58–78) that the harboring (18 U. S. C. 1071), accessoryship after the fact (18 U. S. C. 3), and conspiracy (18 U. S. C. 371) provisions of the Criminal Code, under which the several counts of the indictment were laid, were unconstitutionally or otherwise invalidly applied to them in several different ways.

[28] It had once been "a toilet", but "wasn't being used at the present time" for that purpose (R. 385).

A. PETITIONERS' CONVICTIONS DO NOT INVOLVE "AN UNCONSTITUTIONAL PYRAMIDING OF OFFENSES"

First, petitioners argue (Br. 58–65) they "were placed in double jeopardy by an unconstitutional pyramiding of offenses" (Br. 58). They contend that this took three forms. We shall examine the arguments in the order of their presentation.

1. *It is not correct, as petitioners claim, that there was at most one substantive offense because "all of the proof which established the harboring of Steinberg also established the accessoryship after the fact to the Thompson conviction"*

Petitioners Kremen and Coleman argue (Br. 60–62) that their conviction "on both the accessoryship and harboring counts" is invalid because, they say, "all of the proof which established the harboring of Steinberg [count 3] also established the accessoryship after the fact to the Thompson conviction [count 1.] Neither offense required the proof of any fact not essential to the other" (Br. 60).[29] However, since petitioner Kremen's sentence on the harboring count was made to run concurrently with her sentence on the accessoryship count (*supra*, p. 14), this argument is not helpful to her. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1. In any event, it is without merit.

Petitioners concede (Br. 60), as they must, that a single act or series of acts may supply the basis for conviction of two or more separate offenses, "so

[29] Since petitioner Steinberg was not charged in the harboring count (he being the allegedly harbored person), this argument is not available to and is not made by him (Br. 60, 63).

long as each requires the proof of a fact not essential to the other." *Pereira* v. *United States*, 347 U. S. 1, 9; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Blockburger* v. *United States*, 284 U. S. 299, 304. This test is clearly met in the instant case. In the first place, the recipient of the "comfort and assist[ance]" which the first, or accessoryship, count charged the defendants named in that count with having rendered, namely, Robert G. Thompson, was a different person from the individual whom the third, or harboring, count charged the defendants named in that count with having "harbor[ed] and conceal[ed]," namely, (petitioner) Sidney Steinberg. It was thus incumbent on the Government to prove under each count a fact—and an obviously important fact—which it was not required to prove under the other.

Furthermore, while the difference in the identity of the recipient of the aid and comfort alleged in the two counts is doubtless the most important of the elements requiring proof under the one count but not the other, it is by no means the sole such element. Under the first, or accessoryship, count, which was based upon 18 U. S. C. 3, it was necessary for the Government to prove (1) that Thompson had been convicted in the United States District Court for the Southern District of New York for violation of the Smith Act; (2) that the defendants named in the count knew of this conviction; (3) that, with this knowledge, they received, comforted, and assisted Thompson; and (4) that their purpose in doing so was to prevent Thompson's apprehension

and punishment (R. 3–4). None of these elements was required to be proved under the third, or harboring, count. Under the latter count, which was based upon 18 U. S. C. 1071,[30] it was necessary for the Government to prove (1) that a warrant had been issued by the United States District Court for the Southern District of New York for the arrest of Steinberg; (2) that the defendants named in the count had notice and knowledge of this fact; (3) that with this knowledge, they harbored and concealed Steinberg; and (4) that their purpose in doing so was to prevent Steinberg's discovery and arrest (R. 6). None of these elements was required to be proved under the first, or accessoryship, count.

Bell v. *United States*, 349 U. S. 81, cited by petitioners (Br. 62), gives no support to their argument. Bell was convicted of violation of the White Slave Act on two counts. Each count involved the same transportation at the same time and place, the difference being that a different woman was named in each count as the person transported. The Government contended that Bell had committed two separate

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[30] Petitioners' interpretation (Br. 58–59, fn. 48) of the legislative history of the August 20, 1954, amendment to this statute is unfounded. The purpose of this legislation was "to create an adequate statutory deterrent for persons who are inclined to conceal fugitives from justice" (Sen. Rep. No. 2141, 83rd Cong., 2d sess.; H. Rep. No. 1928, 83rd Cong., 2d sess.). The reports, citing this very case, informed Congress that these petitioners were to be tried as accessories after the fact in addition to harboring. The only intent of Congress, so far as can be determined, was to increase the penalties of the harboring statute. There is nothing which indicates a belief on the part of Congress that the harboring statute is the only statute applicable to this case.

and distinct offenses, as the statute prohibited the transportation of *any* woman in interstate commerce for immoral purposes. The Court, holding that the gist of the offense was the act of transportation itself, decided that, since there had been but one such act, only one offense had been committed. The basis of this decision was the ambiguity within the statute itself, which was resolved "against turning a single transaction into multiple offenses." (349 U. S. at 84).[31] For the reasons stated *supra*, pp. 44–46, the case at bar is clearly distinguishable.

United States v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, and *Short* v. *United States*, 91 F. 2d 614 (C. A. 4), also relied on by petitioners (Br. 62), are equally inapposite. In the *Universal C. I. T. Credit Corp.* case, the Court decided, after a careful study of the legislative history of the statute involved, that Congress sought to punish a *course of conduct* rather than each individual violation of the Act. In *Short*, the court, finding that one of the defendants had previously been convicted in another jurisdiction of a conspiracy that encompassed the conspiracy for which he was being tried in the case before the court, held that he had for that reason been placed in double jeopardy by the later prosecution.

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[31] See also *Robinson* v. *United States*, 143 F. 2d 276 (C. A. 10). Cf. *Oddo* v. *United States*, 171 F. 2d 854 (C. A. 2); *Ladner* v. *United States*, 230 F. 2d 726 (C. A. 5), pending on writ of certiorari, No. 568, this term; *Piquett* v. *United States*, 81 F. 2d 75, 80 (C. A. 7), certiorari denied, 298 U. S. 664.

2. *The convictions under the conspiracy counts were not the result, as petitioners claim, of a "splitting" into "two separate conspiracies" of "what was at most a single conspiracy"*

Petitioners Kremen and Coleman next contend (Br. 62–63) that "[i]n addition to splitting up into two substantive offenses what was at most the single crime of harboring, the government also split what was at most a single conspiracy into two separate conspiracies" (Br. 62). "There was no evidence whatsoever," they argue, "to show any agreement to aid Steinberg separate and apart from an agreement to aid Thompson, or *vice versa*" (*ibid.*).[32]

Here again, as in the case of the preceding argument (see *supra*, p. 44), it is to be observed preliminarily that, since petitioner Kremen's sentences on the two conspiracy counts were made to run concurrently (*supra*, p. 14), this argument is not helpful to her. In any event, the contention has no more merit than the previous contention, *i. e.*, that only one substantive offense was proved.

A conspiracy is an agreement between two or more persons to accomplish a criminal act or acts by concerted action. The test of whether there is a single conspiracy or multiple conspiracies is the number of agreements entered into between the conspirators and whether their activities have a single or multiple objectives. *United States* v. *Rosenberg*, 195 F.

[32] Since petitioner Steinberg was charged in only one of the conspiracy counts (count 2), this argument, like the preceding argument (see fn. 29, *supra*, p. 44), is not available to and is not made by him (Br. 62, 63).

2d 583, 600–601 (C. A. 2), certiorari denied, 344 U. S. 838; *United States* v. *Speed*, 78 F. Supp. 366, 368–369 (D. D. C.). Of course, it is well settled that the agreement or agreements need not be express, but may be inferred from the circumstances shown. *United States* v. *Glasser*, 116 F. 2d 690, 699 (C. A. 7), modified on other grounds, 315 U. S. 60; *Nilva* v. *United States*, 212 F. 2d 115, 121 (C. A. 8), certiorari denied, 348 U. S. 825; *Oliver* v. *United States*, 121 F. 2d 245, 249 (C. A. 10), certiorari denied, 314 U. S. 666; *United States* v. *Georga*, 210 F. 2d 45, 48 (C. A. 3). It is similarly clear that new persons may join an existing conspiracy and that this is not deemed to terminate the original conspiracy and to replace it with another so long as the original objective remains unchanged. *Skelly* v. *United States*, 76 F. 2d 483, 489 (C. A. 10), certiorari denied, 295 U. S. 757.

The evidence at bar warranted the jury in concluding that there were two separate and distinct conspiracies, just as there were two separate and distinct substantive offenses (see *supra*, pp. 44–46), and that petitioners Kremen and Coleman were members of both, each having become a party thereto at different times.

So far as the record shows, there was originally no direct connection between the count-2 conspiracy—that involving the rendering of comfort and assistance to the fugitive Thompson—and the count-4 conspiracy, involving the harboring and concealing of petitioner Steinberg. In fact, the evidence tends affirmatively to establish that the two conspiracies first

became linked less than a week prior to the arrests at the Twain Harte cabin.

The earliest overt acts of the conspiracy to aid Thompson, the record shows, occurred in Missouri, where Thompson and Coleman, together with two other persons, spent the 1953 Decoration Day weekend in a motel adjacent to a fishing resort (R. 566–569, 574–575; G. Ex. 107). The next act of this "Thompson" group took place in St. Louis, Missouri, where Coleman purchased a new car on June 5, 1953, for their further travels (R. 548). After the purchase of this car, the record is silent as to the travels of the "Thompson" group until the Fourth of July weekend, when Thompson and Coleman, again with their two companions, returned to Camdenton, Missouri, in their new car, for another weekend of fishing and boating (R. 570–571, 575–577; G. Ex. 108).[38] The "Thompson" group—Thompson, Coleman, and two others—next appeared, on August 10, 1953, in Bigfork, Montana, where Thompson obtained a fishing license under his pseudonym, "J. F. Brennan" (R. 596). The group then spent a full week in Polson, Montana, a

[38] The testimony of Mrs. Dorothy Henrichsen (R. 700–715) tends to place Thompson in Twain Harte in the latter part of June or early part of July, 1953. It is almost certain, however, from the evidence as a whole, particularly that being reviewed in the text at this point, that this witness was mistaken as to the identity of the individual (identified by her as Thompson) whom she saw in her store with petitioners Kremen and Steinberg on the occasion about which she testified. The jury, after some deliberation, returned to the court and rechecked the dates of Mrs. Henrichsen's testimony together with the dates given by Mr. Donner, the Camdenton motel-operator, before rendering its verdict (R. 929–932).

fishing resort, vacating the cabins there on August 17, 1953 (R. 600–601). Three days later, on August 20th, the group's new car, with four passengers, entered the State of California from Oregon (R. 412). Thompson and Coleman were seen walking together on the street in Twain Harte (R. 709–710) and were also seen at the cabin on the afternoon of August 26th—one day before the arrests—in the company of petitioner Kremen (R. 526-527). On the morning of the arrests, August 27, 1953, apparently after having spent the night in the cabin with the other persons who were arrested, Thompson and Coleman were seen leaving and entering the cabin (R. 189–192, 194), being apparently well established there (R. 189, 192–195, 210–212; G. Exs. 14–18, A–1 through A–14).

The "Steinberg" group, on the other hand, appears to have commenced operations on or about June 20, 1953, when petitioner Kremen went to Twain Harte for the purpose of renting a secluded cabin in a quiet spot (R. 619–620). After finding the cabin, petitioner Kremen gave the real estate agent a deposit of $25 and paid the balance of the first month's rent on June 25th (R. 622). Petitioners Kremen and Steinberg had moved into the cabin not later than early July, when the owner of the cabin, Mr. Germany, and his wife were invited to have breakfast with those two petitioners at the cabin (R. 668–669). Steinberg and Kremen remained in Twain Harte during July and August and were regular customers in the local food market (R. 676, 682–683). As stated above, Thompson and Coleman joined this group at

the cabin within a week, and probably only a day or two, prior to the arrests.

On the basis of these facts, the jury was fully warranted in finding that two separate and distinct conspiracies existed; that one of these was the conspiracy (charged in the second count) to "receive, relieve, comfort and assist" Thompson, with knowledge of Thompson's Smith Act conviction, in order to "hinder and prevent his apprehension and punishment" (R. 4); that the other was the conspiracy (charged in the fourth count) to "harbor and conceal" Steinberg, with knowledge of the existence of an outstanding warrant for Steinberg's arrest, in order to "prevent his discovery and arrest" (R. 6–7); and that these conspiracies were originally formed at different times and at different places and with different original members. The jury was further warranted in finding that, while petitioners Kremen and Coleman were both ultimately members of both conspiracies, and while each may have been an original member of one of the conspiracies (not, however, of the same one), neither was an original member of both conspiracies.

In other words, the evidence tends to show, and the jury was accordingly justified in concluding, that petitioner Kremen, who had previously (since at least as early as June 20, 1953; see *supra*, p. 51) been a member of the conspiracy involving the harboring of Steinberg at the Twain Harte cabin, subsequently became a member of the conspiracy involving the rendering of comfort and assistance to Thompson, when Thompson and Coleman arrived at the cabin

some time during the week preceding the arrests; and that petitioner Coleman, who had previously (since at least as early as the 1953 Decoration Day weekend; see *supra*, p. 50) been a member of the conspiracy involving the giving of comfort and assistance to Thompson, later became a member of the other conspiracy, when he (Coleman) and Thompson arrived at the Twain Harte cabin. The two conspiracies became linked up when Coleman and Thompson arrived at the cabin, but only in the sense that the members of each joined the other, and commenced, for a while at least, to share the same roof. But there is manifestly no warrant in the evidence for petitioners' contention that there was at most only one conspiracy, which was unjustifiably "split up" into two for the purpose of "pyramiding" their offenses.

3. *The offense charged in each of the conspiracy counts is not the same offense as that charged in the corresponding substantive count*

Petitioners also contend (Br. 63–65) that "[t]he conviction of all petitioners on the conspiracy counts,[34] in addition to their convictions on the substantive counts, is invalid" (Br. 63) because, they say, the offense charged in each of the conspiracy counts is the same offense as that charged in the correspond-

[34] In fact, petitioner Steinberg was convicted on but one of the conspiracy counts, count 2, this being the only one of the conspiracy counts in which he was charged (*supra*, pp. 4–5). However, this fact does not prevent him from benefiting from such merit as the present contention may have.

ing substantive count. Since petitioner Kremen's sentences on all counts were designated to run concurrently (*supra*, p. 14), this contention, like the two preceding ones (see *supra*, pp. 44, 48), and for the same reason, is not helpful to her.

It is settled that conspiracy to commit an offense is distinct from the substantive offense which is the object of the conspiracy, and may be separately punished. *Pereira* v. *United States*, 347 U. S. 1, 11; *Pinkerton* v. *United States*, 328 U. S. 640, 643–644, and cases cited. Of course, if "the agreement of two persons *is necessary for* the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime"[35] (*Pinkerton* v. *United States*, *supra*, at 643, emphasis added), a conspiracy charge "may not be added to the substantive charge" (*ibid.*). But this principle has no applicability here since, as petitioners concede, "one person alone may commit the crimes of accessoryship or harboring" (Br. 63).

Petitioners attempt to escape the effect of their concession by arguing that, although the crimes of

[35] The crime (sale of liquor) involved in *United States* v. *Katz*, 271 U. S. 354, which case is cited for the principle in *Pinkerton*, at 643, is an example of this type of substantive offense. Petitioners' reliance on the *Katz* case (Br. 65) is thus misplaced. Equally misplaced is their reliance (*ibid.*) on *Gebardi* v. *United States*, 287 U. S. 112. That case (transportation of a woman, with her consent, in violation of the Mann Act) involves the basically identical principle that, "where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime" (*Pinkerton*, at 643, citing *Gebardi*), a conspiracy charge will not lie in addition to the substantive charge.

accessoryship and harboring do not *necessarily* volve multiple defendants, where, as here, "a mu plicity of defendants are" *in fact* "involved in harboring or accessoryship situation, they of nec sity must act in concert. * * * In other words, two or more persons, at the same time and place, h bor a fugitive or are accessories after the fact t crime, they must act in concert" (Br. 63–64). E the decisions to which we have referred (*supra*, p. 5 make clear that it is only where the substantive offe sive is such that by its very nature it requires conc of action, or the agreement of two or more perso that a charge of conspiracy may not be laid. Sin the substantive offenses here in issue are conceded not of this type, petitioners' argument fails. W agree with petitioners that "[i]t is inconceivable th more than one person can commit these substanti offenses", in the manner in which the evidence at b showed them to have been committed, "without the being at least an 'implied' agreement" (Br. 64) t commit them. This fact, however, serves but to em phasize the solid character of the evidence from whic the jury inferred the existence in fact of the conspira cies charged.

B. RECEIVING AND ASSISTING ONE WHO, HAVING ALREADY BEEN CONVICTED OF AN OFFENSE AGAINST THE UNITED STATES, HAS FLE FROM JUSTICE, IN ORDER TO HINDER AND PREVENT HIS APPREHENSION AND PUNISHMENT, CONSTITUTES, WITHIN THE MEANING O 18 U. S. C. 3, ACCESSORYSHIP AFTER THE FACT TO THE OFFENSE O WHICH THE FUGITIVE WAS CONVICTED

Petitioners next contend (Br. 66–73) that thei convictions on the first, or accessoryship after the

fact, count cannot be sustained because, at the time of their alleged acts of accessoryship, Thompson had already been convicted of the offense (violation of the Smith Act) to which they were charged as accessories. "[T]he accessory after the fact statute", they say, "was never intended to apply to assistance rendered a fugitive * * * after his conviction * * * of the principal offense" (Br. 66).

The contention is without merit. It is refuted both by the plain language of the accessory statute and by the pertinent authorities of the common law, from which petitioners concede the statutory definition to have been derived (Br. 66–67).

An accessory after the fact is defined by 18 U. S. C. 3 as one who, —

> * * * knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial *or punishment* * * *. [Emphasis added]

Punishment[36] can only be imposed *after conviction.* The substance of a sentence consists of the kind and amount of punishment adjudged. *Sengstack* v. *Hill,* 16 F. Supp. 61, 62 (M. D. Pa.).

It is to be noted that the clause of the statutory definition, *supra,* which refers to the purpose for which the accessory receives or assists the person who

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[36] Punishment, contrary to petitioners' contention (Br. 69), is not an ambiguous word, especially within the context of the statute. Hence, such cases as *Pierce* v. *United States,* 314 U. S. 306, *United States* v. *Weitzel,* 246 U. S. 533, and *Lanzetta* v. *New Jersey,* 306 U. S. 451, cited by petitioners (Br. 69–70), are inapplicable.

has committed the pricipal offense, makes reference to three distinct stages of a criminal action, *viz.*, apprehension, trial, and punishment. It is significant, moreover, that these stages are set forth in the sequence in which they normally occur in a criminal action (apprehension, trial, and, if convicted, punishment). In order to give the word "punishment" in 18 U. S. C. 3 its normal meaning in the context in which it appears, it is plainly necessary to construe the statute as including within the ambit of accessoryship after the fact the rendering of assistance to a convicted fugitive for the purpose of enabling him to avoid execution of the sentence.

The heart of petitioners' contention lies in their interpretation of the meaning of accessoryship after the fact at common law. If that interpretation is mistaken, their whole argument falls.

Blackstone defies accessoryship after the fact as follows (4 *Commentaries*, 37–38):

> And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessary. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him.[37]

Thus Blackstone gives equal emphasis, as does the statute here in issue (which would appear to be derived from Blackstone), to all three elements in the

[37] To the same effect, see Bishop, *Criminal Law*, Vol. 1 (9th ed.), § 695, p. 500.

clause defining the purpose required to make one an accessory—apprehension, trial, and punishment. Bishop, in discussing the crime of aiding a felon to escape, states (*Criminal Law*, Vol. 2, (9th ed.), § 1069, p. 801):

> * * * The accessorial offense may be equally committed by any other assistance given [the felon] *at any time after* his felony; as, by facilitating his escape from confinement, or by harboring or concealing him knowing of his guilt,—it being immaterial whether he has been arrested *or otherwise proceeded against*, or not. [Emphasis added.]

The clear implication is that at common law one who aided a felon after the latter's conviction was an accessory to the principal crime.[38]

This, indeed, was the specific holding of *Rex* v. *Burridge*, 3 P. Wms. 439, 24 Eng. Reprint 1133 (King's Bench, 1735). In that case, Burridge had been indicted for having willfully and feloniously "aid[ed] and assist[ed]" one Palmer to escape from jail, to which he had been committed pursuant to a judgment of conviction for theft. The question before the court was the sufficiency of the indictment to charge Burridge with a felony (3 P. Wms. at 483, 24 Eng. Reprint at 1149). Lord Chief Justice

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[38] *Dent* v. *State*, 43 Tex. Cr. 126, 65 S. W. 627, cited by petitioners (Br. 71, fn. 59), is not to the contrary. The language of *Dent* on which they rely is found in the concurring opinion, not in the majority opinion. Also it should be noted that the dissent in *Dent* took issue with the concurring judge's reasoning and cited *Rex* v. *Burridge*, 3 P. Wms. 439, 24 Eng. Reprint 1133 (see the discussion of this case in the text immediately following) to support his views (see 65 S. W. at 636–643).

Hardwicke, speaking for a unanimous Court of King's Bench, held that, while the indictment was insufficient to charge "a new principal felony, substantive and distinct from the felony of" Palmer (*ibid.*), it was sufficient (unless defective for failure to allege that Burridge knew of Palmer's conviction; see fn. 39, *infra*) to charge accessoryship after the fact to Palmer's felony. "[W]e are all of opinion", said the Lord Chief Justice (3 P. Wms. at 485, 24 Eng. Reprint at 1150)—

> * * * that a man may become an accessary to a felony after the fact, by assisting a felon convict, being in custody under a sentence of transportation, to escape out of prison; provided it be such an assistance as doth in Law amount to a receiving, harbouring or comforting such felon.[39]

Petitioners' attempt to distinguish the *Burridge* case is unavailing. They point out, correctly, that *Burridge* "involved aiding a prisoner to escape" (Br. 69, fn. 58). But that fact does not distinguish the case. The significant fact about *Burridge* is that, notwithstanding that the aided person there, as here, had already been convicted of the principal offense, the accessoryship charge was held good. The crime of accessoryship after the fact is the same crime,

[39] The court held, however, that the indictment was deficient for failure to allege *scienter* on the part of Burridge, *i. e.*, knowledge of Palmer's conviction (3 P. Wms. at 493–497, 24 Eng. Reprint at 1152–1154). For this reason Burridge was ordered discharged (3 P. Wms. at 498, 500, 24 Eng. Reprint at 1154, 1155). The reporter indicates that subsequently Burridge was tried under a new indictment in which the requisite *scienter* was alleged (3 P. Wms. at 500–504, 24 Eng. Reprint at 1155–1156).

whether it consists of "facilitating [the principal] offender's] escape from confinement" or "harboring or concealing him" (Bishop, *Criminal Law*, Vol. 2, (9th ed.), § 1069, p. 801; *supra*, p. 58). The *Burridge* case is thus squarely in point and completely supports the Government's position on this issue.

Petitioners cite no authority for their contention that the accessoryship definition, as contained in 18 U. S. C. 3, should be construed more narrowly than its plain terms require. Their contention, if sound, would delete from the definition all acts of aid, comfort, and assistance rendered to admitted felons—acts done for the admitted purpose of hindering and preventing their punishment—solely because the offenders' guilt has already been conclusively established by their previous trial and conviction. This suggested limitation is not only logically untenable, but is contrary to the common-law authorities.

Nor is petitioners' contention supported by the fact that the crime of accessoryship after the fact appears in one of the early sections of the Criminal Code. They suggest (Br. 72) that it can be assumed from this fact that it was not the intent of Congress that assisting an already-convicted person to avoid punishment should constitute accessoryship after the fact to the offense of which that person was convicted, because the statutory provisions relating to crimes committed after the conviction of another person (*e. g.*, "escape and rescue" and "fugitives from justice") appear in later chapters of the Code. What petitioners overlook, however, is that accessoryship

after the fact is a *general* concept—that is to say, it relates to any kind of an offense. A person, in other words, may be an accessory after the fact to any of the substantive offenses elsewhere defined in the Criminal Code. For this reason, the logical place for the insertion of the accessoryship definition was precisely where Congress placed it—among those "General Provisions" appearing in the first chapter of the Code, alongside such other definitions as those of "felony" (§ 1), "misdemeanor" (§ 1), "principal" (§ 2), etc. Manifestly, the fact that the accessoryship definition appears in one of the early sections of the Code has no bearing on the question of whether one can be an accessory to a principal offense of which the offender has been convicted.

C. THE ELEMENT OF *SCIENTER* WAS CLEARLY PROVEN AGAINST PETITIONERS

Petitioners also argue (Br. 73–78) that their convictions were obtained without any evidence of *scienter*. This contention, too, is clearly without merit.

Criminal intent is an essential element of virtually all serious offenses. In many cases it is almost impossible to prove this mental state through direct evidence. *Holland v. United States*, 348 U. S. 121, 140. Therefore, the criminal element of *scienter* may be inferred from seemingly isolated acts if they are sufficiently numerous, even though each act standing by itself may seem unimportant. *Morissette* v. *United States*, 342 U. S. 246, 276; *Nassan* v. *United States*, 126 F. 2d 613 (C. A. 4).

In the instant case, petitioners were apprehended under very suspicious circumstances, and the evidence adduced at the trial certainly confirmed these suspicions. At the time of their arrest, they were residing in a very secluded mountain cabin under assumed names in the company of well-known fugitives from justice. Coleman and Steinberg had both been longtime cohorts of Thompson at the New York headquarters of the Communist Party (R. 505–513). Coleman had supplied Thompson with a car (R. 430, 555, 558), and accompanied him around the country (R. 565, 596, 601, 603). Steinberg, himself one of the fugitives, was in charge of and host at the cabin (R. 670–671). Both knew that Thompson was using a false name and had materially altered his appearance. It is too much to suppose that persons in their situation would not have known of the conviction and subsequent flight from justice of a top Communist Party leader like Thompson. See also *supra*, pp. 5–11.[40]

The evidence of *scienter* in the case of petitioner Kremen is no less strong. She had rented the cabin for her supposedly sick brother (R. 620–622). Her "sick brother" turned out to be petitioner Steinberg, who was neither ill nor related to her, and who was

[40] Although Chief Judge Denman dissented below, he indicated that he would sustain the convictions of petitioners Coleman and Steinberg on the accessoryship count and the corresponding conspiracy count (231 F. 2d at 181–182).

also a fugitive from justice. She was using a false name and possessed elaborate documentary indicia of a false identity (R. 362, 363; G. Ex. 86). She purchased large quantities of food (R. 676, 685, 778), bought sporting supplies (R. 701–702), performed household tasks for the occupants of the cabin (R. 193–194, 669), and saw to the maintenance of at least one of the vehicles (R. 787–789). On one of her shopping expeditions, her male companion purchased hair dye (R. 683). When apprehended, Thompson had dyed hair and a dyed mustache (R. 326).

The only rational explanation for these activities—the explanation presented to the jury by the Government—was that, with full awareness that Thompson and Steinberg were fugitives who were being sought by the Government, she wished to prevent their apprehension. On the record made at the trial there is no other reasonable explanation. In *Holland* v. *United States*, 348 U. S. 121, 138–139, this Court stated that "once the Government has established its case, the defendant remains quiet at his peril."[41] The jury was therefore justified in making the inference which was virtually compelled by the evidence. *Scienter* was more than amply proved.

[41] Petitioners' attempt to distinguish the *Holland* case (Br. 75) on the ground that it was a "tax case" is unsound. *Holland*, while a tax case, was still a *criminal* case, and the defendants there enjoyed the presumption of innocence and every other right that a defendant in any other type of criminal case is entitled to.

IV

THE FACT THAT THE ACCESSORYSHIP COUNT AT ONE POINT MISTAKENLY REFERRED TO THE PRINCIPAL OFFENSE AS CONSPIRACY TO ORGANIZE A SOCIETY FOR "THE OVERTHROW" (RATHER THAN "ADVOCATING THE OVERTHROW") OF THE GOVERNMENT BY FORCE DID NOT PREJUDICE PETITIONERS, WHO WERE CLEARLY APPRAISED OF THE NATURE OF THE CHARGE

Petitioners' argument that, because the accessoryship count at one point mistakenly referred to the principal offense of Thompson as conspiracy to organize a society for "the overthrow" (rather than "advocating the overthrow") of the Government by force (see R. 3), the count failed to charge an offense and there was a "fatal variance" between the pleading and the proof (Br. 79–83) is clearly insubstantial. As observed by Judge Lemmon in the principal affirming opinion below (R. 975; 231 F. 2d at 173):

> An inartificiality in pleading, *by way of recital* in an indictment, of the conviction of an individual who is not even a defendant in the case at bar, cannot be tortured into being a basis for reversible error in failure of proof. [Emphasis in the original]

Moreover, the count in question plainly stated, a line or two after the challenged language, that Thompson's offense had been "in violation of Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act" (R. 3). Thus, the statute violated by Thompson was specifically set forth and was incorporated by reference. This sufficed to in-

form the accused of the offense of which Thompson had been convicted and of that with which they themselves were being charged. See *McCoy* v. *United States*, 169 F. 2d 776, 780 (C. A. 9), certiorari denied, 335 U. S. 898. Under Rule 7 (c) of the Federal Rules of Criminal Procedure, providing for simplified indictments, it was not necessary to allege more than the essential facts of the offense.

Furthermore, petitioners' contention is based on but one part of the incidental recital of Thompson's offense. Count 1 charged petitioners with being accessories after the fact to the offense of Thompson, who, it was alleged, had been convicted of "conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence * * *" (R. 3). Petitioners' complaint is directed solely at the first of the two numbered clauses in the quoted excerpt. They do not, and indeed cannot, challenge the complete verbal accuracy of the second of the two clauses.

In any event, the language in the count to which petitioners object is no more than a compressed paraphrase of the language Chief Justice Vinson used in describing the conclusions of the Court of Appeals for the Second Circuit in upholding that court's decision affirming the conviction of Thompson and ten

other Communist Party leaders." There can be no doubt, we believe, that petitioners and their lawyers knew precisely the nature and the identity of the conviction to which the count in question referred.

The indictment thus fully apprised petitioners of the offense with which they were charged and it will certainly stand as a bar to any future prosecution of them for accessoryship after the fact to Thompson's crime. This is all that is required. *Hagner* v. *United States*, 285 U. S. 427, 431; *Wilson* v. *United States*, 158 F. 2d 659 (C. A. 5), certiorari denied, 330 U. S. 850. It is enough that the essential elements of the offense appear in any form, or by fair construction can be found within the terms of the indictment, considered as a whole. *Hagner* v. *United States*, *supra*, at 433; *McCoy* v. *United States*, 169 F. 2d 776, 780 (C. A. 9), certiorari denied, 335 U. S. 898. Any error, defect, irregularity, or variance which does not affect substantial rights is to be disregarded. Rule 52 (a), F. R. Crim. P. Clearly, petitioners were not prejudiced here.

With respect to petitioners' contention that there was here a fatal variance between the pleading and

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[13] Chief Justice Vinson's opinion stated that the Court of Appeals had concluded that the Communist Party's policy "worked for the overthrow of the Government by force and violence; * * * that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence." *Dennis* v. *United States*, 341 U. S. 494, 498.

the proof at the trial (Br. 82–83), it is to be remembered that the only kind of variance which is fatal is a variance which is of such a character as to affect the substantial rights of the accused. *Berger* v. *United States*, 295 U. S. 78, 82; *United States* v. *Cohen*, 175 F. 2d 82 (C. A. 2), certiorari denied, 323 U. S. 799; *Smiley* v. *United States*, 186 F. 2d 903, 905 (C. A. 9). The only "variance" claimed—a trifling variance with respect to *one part* of the incidental recital of Thompson's conviction (*supra*, pp. 64–66)—is plainly not of this type.[43]

[43] Petitioners' contention (Br. 83–86) that the trial judge erred in instructing the jury "as a matter of law" that "the record shows that Thompson was convicted" of "the crime * * * described" in the "first count of the indictment" (R. 913–914; see Br. 84, fn. 68) is but another facet of their contention that there was a fatal variance between the pleading and the proof in the respect to which we have referred in the text. It has, consequently, no more merit than the "fatal variance" argument itself. For the same reasons to which we have referred with respect to that argument, the instruction of which petitioners complain could not possibly have prejudiced them. It is to be noted, furthermore, that in the concluding sentence of the pertinent passage of the instructions the judge specifically and correctly described Thompson's offense as "the crime of conspiring to teach the overthrow and destruction of the United States Government by force and violence" (R. 914; Br. 84, fn. 68). Judge Lemmon correctly characterized the present contention of petitioners as an unwarranted effort to "magnif[y]" "incomplete language in [the] trial judge's instructions" into "a basis for reversible error" (R. 975; 231 F. 2d at 173).

It should also be noted that petitioners do not question the propriety of the judge's removal of the question of the fact of Thompson's Smith Act conviction from the jury's consideration. And since the fact of that conviction is a matter of official court record, in this as well as other federal courts, it was clearly proper for the judge to do so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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